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SIXTH COMMITTEE
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at 3 p.m.
New York

SUMMARY RECORD OF THE 12th MEETING

Chairman: Mr. LEHMAN (Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

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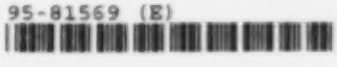

The meeting was called to order at 3 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (A/50/10 and A/50/402)

1. The CHAIRMAN invited the Chairman of the International Law Commission to introduce the Commission's report.

2. Mr. RAO (Chairman of the International Law Commission) paid tribute to the memory of two illustrious jurists who had died recently, Mr. Roberto Ago and Mrs. Suzanne Bastid. Mr. Ago, a former member of the International Court of Justice, had contributed immensely to the study of the topic of State responsibility, in his capacity as Special Rapporteur of the International Law Commission on that subject. Mrs. Bastid, an eminent French jurist, had combined great human qualities with remarkable scholarship in international law.

3. Introducing the report of the International Law Commission on the work of its forty-seventh session (A/50/10), he said that the Commission was currently considering five topics. The topic "Draft Code of Crimes against the Peace and Security of Mankind" was well advanced and the Commission expected to complete its second reading by the end of its next session. Similarly, the topic of State responsibility, after several years of exhaustive work, was expected to be completed on first reading by the end of the next session. Concerning the draft Code of Crimes, at its latest session the Commission had considered a list of crimes to be included in the Code. It had decided to concentrate as a matter of priority on the inclusion of four crimes: aggression, genocide, systematic or mass violations of human rights and exceptionally serious war crimes. It had also been decided that, in formulating those articles, the Drafting Committee would bear in mind all or parts of the elements of the draft articles adopted on first reading concerning intervention, colonial domination and other forms of alien domination, apartheid and crimes concerning mercenaries and terrorism. Some decisions with respect to certain other offenses were to be taken at the next session. In addition, under the topic of the draft Code, the Drafting Committee had finalized a number of articles which would be presented the following year along with articles currently awaiting adoption in plenary.

4. On State responsibility, the Commission had discussed the legal consequences of internationally wrongful acts characterized as crimes. In addition, it had finalized two articles on countermeasures and the relevant commentaries, namely, articles 13 and 14 dealing with the concept of proportionality and prohibited countermeasures. It had also adopted draft articles with commentaries on the settlement of disputes under part III and the annex thereto.

5. With respect to the consequences of crimes, the Commission had considered the proposal that the right of the international community and of immediately aggrieved parties to respond to a crime should be subject to a prior determination of the wrongful act, through reference first to the United Nations for a determination of the existence of the crime and its attribution to the State and then to the International Court of Justice for a final legal

determination. The views expressed in that regard indicated that a consensus had yet to be achieved.

6. On the topic of international liability, he recalled that the Commission had so far finalized several articles with commentaries on the concept of prevention. At its latest session, it had made further progress and finalized four more articles: article A on the right of a State to pursue any activity within its territory and the delimitations thereon; article B on the duty to prevent and the concept of due diligence; article C on liability and reparation; and article D on cooperation or assistance from relevant international organizations. In addition, the Commission had discussed proposals concerning the definition of harm to the environment. Preliminary discussions had been held on a proposal to define harm to the environment in a restrictive manner for the purpose of liability. The Commission hoped that the progress made would enable it to complete its first reading of various draft articles on the topic of prevention.

7. The Commission had also begun preliminary work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", which had enabled it to clarify the issues involved and the direction to be taken in future work on those topics. Further, the Commission had recommended to the General Assembly that it should be allowed to work on the topic "Diplomatic protection" and to prepare a feasibility study, as a first step, on the topic "Rights and duties of States for the protection of the environment".

8. Turning to the report of the Commission (A/50/10), he said that in view of the way in which the Committee intended to consider the report, he would first introduce chapter II, on the draft Code of Crimes, chapter IV, on State responsibility, and chapter V, on international liability for injurious consequences arising out of acts not prohibited by international law. He would then introduce chapter III, on State succession, chapter VI, on reservations to treaties, and chapter VII, other decisions and conclusions of the Commission.

9. With regard to chapter II on the draft Code of Crimes against the Peace and Security of Mankind, the task of preparing a draft Code gained added significance in the light of the serious crimes being committed in various parts of the world. The Code must be sufficiently precise to meet the requirements of the principle nullum crimen, nulla poena sine lege. Further, its elaboration was fraught with immense political and legal difficulties. At the latest session, the Special Rapporteur on the topic had presented his thirteenth report recommending that only 6 of the 12 crimes identified in first reading for inclusion in the Code should be retained, namely, aggression (article 15), genocide (article 19), systematic or mass violations of human rights (article 21), exceptionally serious war crimes (article 22), international terrorism (article 24) and illicit traffic in narcotic drugs (article 25). The six remaining crimes, which the Special Rapporteur had proposed leaving out because they had given rise to opposition or reservations on the part of various Governments, were: the threat of aggression (article 16), intervention (article 17), colonial domination and other forms of alien domination (article 18), apartheid (article 20), the recruitment, use, financing and training of mercenaries (article 23) and wilful and severe damage to the

environment (article 26). It would be recalled that in his previous report, the Special Rapporteur had announced his intention to limit the list of crimes to those on which there was broad agreement as to their inclusion.

10. Some members of the Commission had favoured the shortened list, which they saw as focusing on types of behaviour involving a serious and immediate threat to the peace and security of mankind. They had thought it advisable to concentrate on those crimes whose prosecution and punishment was well-established in international law and had not considered it necessary to include in the draft Code those crimes which were only of historical significance. Other members, however, had felt that the list of crimes should not be reduced because a comprehensive Code would be a more effective tool for strengthening international law and international peace and security. They had noted that some of the crimes which had been excluded were covered and defined by international instruments and fully qualified for inclusion in the future Code. They had also pointed out that a restrictive approach would not necessarily enhance the acceptability of the Code nor increase the likelihood of a consensus on its content.

11. There had been broad agreement during the debate that aggression was the quintessential crime against the peace and security of mankind. The difficulties involved in the elaboration of a sufficiently precise definition of aggression for purposes of individual criminal responsibility had also been broadly acknowledged. In that connection, some members had considered that the definition adopted on first reading, which was drawn from General Assembly resolution 3314 (XXIX), should be adapted for the purposes of the Code. He understood that the Ad Hoc Committee on the Establishment of an International Criminal Court, which had met recently in New York and whose report would soon be considered by the Sixth Committee, had also dealt with that problem.

12. While the proposed deletion of the threat of aggression from the list of crimes under the Code had met with broad support, opinions had been divided on deleting the crime of intervention from the list. Some members, while recognizing the importance of non-intervention as a fundamental principle of contemporary international law, had considered the concept to be too nebulous and not sufficiently rigorous for criminal law purposes. Others had favoured keeping it in the Code, insisting that intervention had brought and continued to bring misery to millions of underprivileged people and qualified fully for inclusion in a draft Code of Crimes against the Peace and Security of Mankind.

13. Opinions had also been divided on the deletion of the crime of colonial domination and other forms of alien domination. Some members had felt that that crime was no longer relevant and was difficult to define, while others had thought that it was a phenomenon of major historical significance in terms of the rights of peoples and therefore should be included in the Code.

14. While there had been virtual unanimity among the members of the Commission on the inclusion of genocide in the list of crimes to be covered by the Code, the same could not be said of apartheid. Those who thought that the crime of apartheid should not be included in the Code had stressed that the practice in question had been abolished in South Africa, and that there was no evidence that it existed elsewhere. Proponents of its inclusion had noted that it was

dangerous to disregard the lessons of history, minimize the serious consequences of apartheid and ignore the many decisions of the relevant United Nations organs. It had been pointed out that the criterion for including a crime in the Code should be its seriousness and not the likelihood of its commission.

15. Systematic or mass violations of human rights - or, to use the term proposed by the Special Rapporteur, "crimes against humanity" - had been seen by most members of the Commission as qualifying for inclusion in the Code. The basic question, however, was to identify the point at which human rights violations, which were essentially matters of domestic concern within the jurisdiction of national courts, became a matter of international concern warranting international jurisdiction. The requirement under the article adopted on first reading, according to which violations must be massive to constitute a crime under the Code, had given rise to divergent views in the Commission, as had the Special Rapporteur's proposal to consider as punishable under the Code not only individuals acting as agents or representatives of the State but also persons acting in their individual capacity.

16. On the question of exceptionally serious war crimes, members of the Commission had been virtually unanimous in considering that such crimes should be included in the Code, but the implications for existing humanitarian law of the distinction between war crimes and exceptionally serious war crimes had continued to be a source of debate.

17. The Commission had also been divided on the recommendation to exclude from the list of crimes the recruitment, use, financing and training of mercenaries. Some members had felt that the limited number of States which had accepted the relevant convention and the possibility of prosecuting the acts in question as acts of international terrorism or, in so far as agents of the State had participated in them, as crimes linked to aggression, justified their exclusion from the list of crimes. Other members had disagreed, considering the crime a threat to the sovereignty and territorial integrity of small and weak States.

18. One group of members had favoured the exclusion of international terrorism from the list of crimes, arguing that the concept could not be defined with the precision required by criminal law and that, in any case, the problem had already been dealt with in a multiplicity of international instruments dealing with specific aspects of terrorism. The question had also arisen as to whether and on the basis of what criteria a distinction should be made between the most serious acts of terrorism, which would come within the scope of the Code, and other acts of terrorism, which would not. A further issue was whether acts of terrorism should be covered by the Code only when they were committed by an agent or a representative of the State, since the Code, as it stood at the moment, provided only for the criminal responsibility of individuals.

19. Illicit traffic in narcotic drugs had also given rise to a divergence of opinion. Some members had viewed it as a threat to the survival of mankind and had underscored the destabilizing effect of "narco-terrorism" on small States and its dangerous links with terrorism and subversion. Other members had taken the view that illicit drug trafficking was effectively covered in existing instruments and that international cooperation provided the means to suppress

that scourge, since most cases could be effectively prosecuted in the national courts.

20. The categorization of wilful and severe damage to the environment as a crime had also posed a problem for the Commission. Some members had opposed its inclusion, pointing out that the Code was not intended to cover all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind. They had noted that the exclusion of a particular conduct from the list of crimes covered by the Code did not mean that such conduct was not considered as a crime punishable in law. Others had felt that certain kinds of environmental damage, such as damage caused by the deliberate detonation of nuclear explosions or pollution of entire rivers, should entail the individual criminal responsibility of those responsible, particularly since the fate of future generations was at stake.

21. Following the debate, the Commission had decided to refer to the Drafting Committee four of the draft articles adopted on first reading, namely, draft articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes), for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary. That action had been taken on the understanding that, in reviewing the draft articles, the Commission would bear in mind and at its discretion deal with all or part of the elements of five other draft articles adopted on first reading, namely, draft articles 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 International terrorism). The Commission had also decided to postpone to its next session a final decision on illicit traffic in narcotic drugs and wilful and severe damage to the environment.

22. The Drafting Committee had made substantial progress on a number of articles of part I of the proposed Code, namely, articles 1, 5, 5 bis, 6, 6 bis, 8, 9, 10, 11, 12 and 13. With respect to part II, it had adopted texts on aggression and genocide. Bearing in mind the provisional nature of the outcome of the Drafting Committee's work, as some articles might require revision, the Commission had decided to defer adoption of the texts proposed by the Drafting Committee and to confine itself at that stage to taking note of the report of the Chairman of the Drafting Committee.

23. With regard to chapter IV of the report, on State responsibility, the Commission had addressed three aspects of the topic. The first was the question of the legal consequences of internationally wrongful acts characterized as crimes in article 19 of part one of the draft articles, as adopted on first reading. That question had formed the subject-matter of the Special Rapporteur's seventh report, which addressed, on the one hand, the special or supplementary consequences to be attached to "crimes" and, on the other hand, the machinery for the implementation of such consequences. In the presentation of his report, the Special Rapporteur had noted that those aspects called for a relatively high degree of progressive development.

24. As far as the substantive consequences of crimes were concerned, the Special Rapporteur had concluded that the obligations laid down in articles 6 (Cessation of wrongful conduct), 6 bis (Reparation) and 8 (Compensation) were incumbent on the author of a crime in the same way as on the author of a delict, the only difference being that, in the case of a crime, all States were injured States, whereas, in the case of a delict, that was true only if the obligation breached was an erga omnes obligation. With regard to restitution in kind and satisfaction, however, the Special Rapporteur took the view that the obligations of the wrongdoing State should be more onerous in the case of a crime than in the case of a delict. As to the instrumental consequences of crimes, the Special Rapporteur had noted that they would be aggravated as compared with the instrumental consequences of delicts not only because, in the case of a crime, all States were injured States and entitled as such to resort to countermeasures, but also because the restrictions placed on the freedom of action of States in the case of a delict might not apply in the case of crimes. With regard to the institutional aspect of the implementation of the consequences of crimes, the Special Rapporteur had proposed a two-phase procedure in which the General Assembly or the Security Council would make a preliminary political assessment before the International Court of Justice was required to make a decisive pronouncement on the existence and attribution of an international crime.

25. The Sixth Committee knew all too well that the very concept of crime which underlay the Special Rapporteur's seventh report had, from the day of its adoption by the International Law Commission in 1976, been a source of some heated debate. Paragraphs 253 to 269 of the report captured the various points of view involved with regard to the legal basis of, and the need for, the concept in question. A view had been expressed that attribution of a crime to a State was not possible within the scope of the Commission's present exercise. Apart from the several precedents attributing responsibility only to individuals in the case of crimes, the main purpose of the Commission was to elaborate a regime of compensation and not to provide for a system of punishment. Further, it was argued that any such exercise would inevitably lead the Commission to enter the field of primary obligations rather than confining itself to the area of secondary obligations; the Commission ought instead to proceed on the assumption that there was a continuum ranging from minor breaches to very serious breaches affecting the international community as a whole, the solution to breaches of great magnitude being to ensure that the draft Code allowed for the imposition of compensation of equal magnitude.

26. Another view was that the concept of crimes in international law was well established and that for acts of exceptional gravity such a characterization with its legal, moral and political dimensions and negative and condemnatory connotations was quite appropriate. The view was further expressed that States had a legal personality and that there was nothing unusual in the notion that States had the capacity to commit crimes.

27. The Special Rapporteur's proposals, particularly those relating to the institutional aspect, had given rise to an interesting debate which was extensively reflected in paragraphs 282 to 319 of the report.

28. While some members of the Commission had approved the general thrust of the proposals made by the Special Rapporteur with regard to substantive consequences, others had expressed doubt as to their validity in view of the need to respect the sovereignty, independence and stability of the so-called "offending State", bearing in mind Article 2 of the Charter of the United Nations. The concept of full restitution in kind, the proposed restrictions on the freedom of the offending State to choose any form of government and the need to protect the vital needs of the population had all been the subject of extensive debate. The need to have a prior decision of the International Court of Justice on the crime alleged and its attribution to a State before countermeasures and other suitable demands could be taken or made against the offending State had also been questioned. Those who favoured prior judicial determination of the crime, on the other hand, had felt it to be very useful to curb or prevent power-play and coercive measures and essential to promote the equity and justice required for a new world order. Some members had continued to hold the view that article 19 of part one of the draft was basically flawed and that a scheme predicated on the acceptance of the notion of a crime stood no chance of being widely accepted by States.

29. The Special Rapporteur's proposals in articles 15 to 19 had been criticized as unrealistic, unduly complex and difficult to implement. It had also been pointed out that they raised questions concerning the Charter of the United Nations and should not be considered until the concept of crime in article 19 had first been re-examined in secondary reading by the Commission.

30. Other members of the Commission, arguing that the concept of crime was not new in international law and provided a good basis to develop the law further, viewed the efforts of the Special Rapporteur as worthy of serious consideration. Moreover, it was noted that, as article 19 had been adopted in first reading, the Commission was obliged to deal with the consequences as proposed by the Special Rapporteur, and that only such an approach would help the Drafting Committee to move forward with its mandate.

31. At the end of the debate, the Commission, by a vote of 18 to 6, had approved the Special Rapporteur's recommendation that his proposals should be referred to the Drafting Committee for consideration in the light of the debate. The arguments adduced for and against the proposal were clearly summarized in paragraphs 337 and 338 respectively and indicated the nature of the terrain to be covered before any consensus could emerge on that aspect.

32. The second aspect of the topic of State responsibility which the Commission had addressed at its forty-seventh session was the instrumental consequences of delicts. At its forty-sixth session, the Commission had provisionally adopted three articles on that subject, namely articles 11, 13 and 14, respectively entitled "Countermeasures by an injured State", "Proportionality" and "Prohibited countermeasures", article 11 having been adopted on the understanding that its wording might have to be reviewed in the light of the text that would eventually be adopted for article 12. At the same session, the Commission had also deferred the formal submission of those three articles to the General Assembly pending action on article 12 and the presentation of the relevant commentaries. At its forty-seventh session, the Commission had had before it the commentaries to all three articles. It had not considered the

commentary to article 11 for lack of time, but had adopted the commentaries to articles 13 and 14, both of which were currently before the Sixth Committee.

33. Article 13 dealt with proportionality. There was no doubt that the determination of the lawfulness of countermeasures on the basis of the criterion of proportionality was a delicate and complicated task, and one that was governed by contextual factors. Nevertheless, it was believed that the additional criterion which involved keeping the "gravity and effects" of wrongful acts in view would serve to limit the possibility for abuse. It had also been proposed that that criterion should not be applied in the case of human rights violations or violations of erga omnes obligations.

34. Article 14 dealt with instances in which the taking of countermeasures was prohibited. Such prohibitions, whether they involved the principle of non-use of force (subpara. (a)), avoiding extreme political or economic coercion (subpara. (b)), respect for the inviolability of diplomatic or consular agents, premises, archives and documents (subpara. (c)) or the requirement not to derogate from basic human rights, had been generally well accepted. He drew attention in that connection to chapter IV, section C, of the Commission's report, in which it was noted that the Commission had yet to take action on article 12 as recommended by the Drafting Committee, which occupied an important position in the scheme of articles prepared.

35. The third aspect of the topic of State responsibility was the settlement of disputes. Since beginning its work, the Commission had considered the possibility of including in the draft articles a third part on the settlement of disputes. In 1993, the Commission had received from the current Special Rapporteur a series of provisions for inclusion in part three, which it had referred to the Drafting Committee together with the proposals of the previous Special Rapporteur on the subject.

36. At its forty-seventh session, the Commission had considered the outcome of the Drafting Committee's work, consisting of a set of seven articles and an annex, contained in chapter IV, section C, of the report. Although the texts recommended by the Drafting Committee had been adopted by a vote, they could be deemed to reflect a broad consensus within the Commission.

37. The dispute settlement system proposed by the Commission extended to all disputes arising out of the interpretation or application of the future convention. It was residual in the sense that the parties to such disputes could at any time, by agreement, resort to any dispute procedure or settlement mechanism of their choice. It was, however, subject to an important exception in article 5, paragraph 2, concerning disputes following the adoption of countermeasures: the State against which countermeasures had been taken could at any time initiate arbitration by unilateral request. Article 7, concerning the validity of arbitral awards, had prompted a number of criticisms. Some members had found it useful to place an effective check on spurious claims of invalidity, while others had expressed concern about adding an additional layer to the dispute settlement process. The former view had prevailed. The annex, which comprised two articles dealing with the conciliation mechanism and the dispute mechanism respectively, had, like the rest of part three, laid down residual rules in the sense that the parties were free to agree on mechanisms

different from those provided for in the annex. However, in the absence of such agreement, third party dispute settlement proceedings could be initiated by unilateral request, meaning, first, that in the case of compulsory conciliation, a conciliation commission would be mandatory on the basis of article 1 of the annex. Secondly, in the case of the arbitration procedure, an arbitral tribunal would have to be constituted in accordance with article 2 of the annex.

38. As indicated in footnote 203, the Commission still had to address the problem of the coexistence of dispute settlement obligations in the context of part three of the future convention and those arising from other instruments. It would also have to deal with the settlement of disputes relating to States crime depending on the outcome of its work in that area. Substantial progress had been achieved on the topic of State responsibility, and although the outstanding issues were highly complex, the Commission hoped that it would be able to complete the first reading of the draft articles at its next session.

39. Concerning chapter V of the Commission's report, on international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had had before it at its forty-seventh session the eleventh report of the Special Rapporteur, which elaborated on the place of harm in the regime to be established under the topic and attempted to define the term "environment". It had also considered a study, prepared by the Secretariat pursuant to a request contained in paragraph 5 of General Assembly resolution 49/51, entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (A/CN.4/471).

40. In its preliminary debate on the two most recent reports of the Special Rapporteur, the Commission had focused particular attention on defining the concept of "harm to the environment". The Special Rapporteur had proposed that elements already covered by the traditional concept of harm, such as harm to property or persons, should be excluded from such a definition. He proposed that "landscapes" should be treated more as "values" treasured by the population than as "components" of the environment. Several members of the Commission had urged that the concept of harm to the environment should be broadened to take account of the human factor by including the following elements: loss of life, personal injury or other impairment of health, loss of or damage to property within the affected State, as well as impairment of the natural resources and human or cultural environment of that affected State. Discussions, however, had focused mostly on the scope of the future instrument and on the formulation of its basic principles.

41. The Commission had established a Working Group to review the question of the identification of dangerous activities and submit appropriate recommendations. On the basis of the Working Group's report, it had agreed that the scope of the future instrument, as envisaged in articles 1 and 2, should be more specifically delineated. Such specification would depend on the provisions on prevention adopted by the Commission and the nature of the liability obligations which it would be developing. One way of proceeding would be to prepare a list of activities, which the Commission could recommend at a later stage of its work. For the time being, the Commission believed that it could rely on the lists of activities contained in various conventions dealing with

issues of transboundary harm, such as the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on Transboundary Effects of Industrial Accidents and the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. It would reconsider the question of identifying the activities to be covered by the draft articles once it had completed its work on the liability aspect of the topic.

42. Concerning the general principles which should guide States in relation to dangerous activities, the Commission had adopted four articles, A, B, C and D, the placement of which would be determined once the entire draft had been adopted on first reading. Article A, entitled "Freedom of action and the limits thereto", drew upon Principle 21 of the Declaration of the United Nations Conference on Human Environment and Principle 2 of the Rio Declaration on Environment and Development. It was formulated so as to recognize implicitly the freedom of action of States, while also indicating the limits thereto. Together with Article D, Article B, entitled "Prevention", provided the theoretical foundation for the articles on prevention which the Commission had already adopted. It made it clear that the relevant obligation was one of due diligence, the standard against which the conduct of a State should be assessed being that which was generally considered to be appropriate and in keeping with the degree of risk of transboundary harm in the particular instance. Activities considered as ultra-hazardous required States to exercise a much higher standard of care in designing policies, as well as a more rigorous enforcement mechanism.

43. Article C, as indicated by the words "in accordance with the present articles", should serve as a basis for the articles on liability and reparation that were still to be developed. It was therefore a working hypothesis and, bearing in mind that the Commission had yet to agree on a specific regime of liability, left open the determination of: first, the entity to be held liable and provide reparation; secondly, the forms and the extent of reparation; thirdly, the characteristics or thresholds of harm giving rise to reparation; and fourthly, the basis or nature of liability. Having reviewed existing practice, the Commission had noted with interest that the approach adopted had been pragmatic, without any theory of liability held consistently applicable. Article D, entitled "Cooperation", extended to all phases of planning and implementation. The phrase "as necessary", which qualified the role of international organizations, indicated that the assistance of such organizations might not be required if the State of origin or the affected State was technologically advanced. Moreover, it recognized that organizations with the necessary resources were not necessarily available in every particular case and that, even if they were, they could act only in accordance with their constitutions and were not therefore obliged to respond to all requests for assistance from States.

The meeting rose at 4.25 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
13th meeting
held on
Friday, 13 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 13th MEETING

Chairman: Mr. LEHMANN (Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CEDE (Austria) reviewed the commendable work carried out by the International Law Commission in the progressive development and codification of international law and expressed his delegation's gratification that so many codification conferences held under United Nations auspices had taken place in Vienna, thus establishing an association between Austria and the universal promotion of international law.

2. In the past, most codification efforts had been undertaken in areas where the reciprocal relation between particular States were directly affected but the recent radical changes in international relations had shifted the focus of such legislative endeavours to the rights and duties of States vis-à-vis the international community as a whole or to the position of individuals under international law in specific areas. The traditional mechanisms of the international codification process had also changed and new challenges had emerged which necessitated a quick and effective response to legal emergencies; thus, under the auspices of the International Atomic Energy Agency, two multilateral conventions had been adopted in 1986 relating to early warning and assistance in the case of nuclear accidents.

3. At the same time, the Commission had continued work on long-term projects, using working methods that had been developed many years before, and a certain stagnation had crept into the classical codification process. Notwithstanding such encouraging initiatives as the draft statute for an international criminal court and the draft articles on the law of the non-navigational use of international watercourses, the classical process of codification of public international law raised serious concerns: since 1980, not a single convention elaborated by the Commission had entered into force and the two drafts on the status of the diplomatic courier and the diplomatic bag and on jurisdictional immunities of States appeared to be making little progress.

4. The danger of the International Law Commission losing its prominent role in the codification of public international law and the need for it to regain the momentum built up over the years had prompted his delegation to make certain reflections. The classical codification procedure of elaborating draft articles as a basis for international diplomatic conferences, with a view to the subsequent adoption of binding instruments of international law, had been successful in the past, but of late had proved rather inflexible and should be reconsidered.

5. In that context, a fundamental question was whether multilateral conventions should remain the primary instruments of codification. Where a high level of acceptance was anticipated, the multilateral convention was probably the most appropriate format. Among possible solutions to the problem of increasing the acceptability of texts, he proposed such methods as limiting their scope to provisions which were based on well-established customary law and practice, although that would leave certain lacunae in areas where there were

conflicting views on the applicability of customary law and practice and such conventions could therefore not aim at comprehensiveness. Alternatively, provision could be made for the posting of reservations, which should, however, be admissible only with regard to certain provisions specifically identified as those which had resulted from compromises and were not based on sufficient customary law and practice. The compromise provisions could be incorporated in additional protocols.

6. He drew attention also to the time factor and to the need for measures to speed up the adoption of rules of international law widely acceptable to the community of States.

7. In addition, serious consideration should be given to the alternative of "soft codification", namely, General Assembly resolutions, declarations of a universal character and "restatements" of customary law and existing practice. Such instruments could have a harmonizing effect on the behaviour of States while avoiding the laborious procedures involved in transforming them into legally binding instruments under the law of treaties. In that context, particular attention could be given to the elaboration, by the Commission, of "restatements", following the methods used by the American Law Institute, which could take the form of handbooks for use by States in the application of international customary law and could be endorsed by resolutions of the General Assembly to give them greater legal and political weight.

8. A further examination should be made of the following aspects of the methods and quality of work of the International Law Commission: the schedule and structure of its meetings; the use of outside resources; interaction with States and their competent authorities; and the financing of, and support for, special rapporteurs. In addition, consideration should be given to the possibility of holding two or more sessions of the Commission per year, which would permit more focused concentration on the topics on the agenda, provided, however, that the special rapporteurs presented their reports regularly at the very beginning of each session. In view of the crucial importance of those reports, due attention should be given to financing research programmes at prominent academic institutions and enlisting the services of competent non-governmental organizations, in order to meet the needs of the rapporteurs.

9. Cooperation with States and their legal advisers could be crucial in expediting speedy acceptance of the final draft of an instrument and new means for such cooperation should be explored. The dissemination of questionnaires was too cumbersome and more informal and flexible forms of dialogue with States should be employed. In addition, the routine consideration of the Commission's reports by the General Assembly should be re-examined and methods identified of providing the Commission at an earlier stage with a more comprehensive overview of the positions of States. Delegations should be encouraged to state their countries' positions on given projects in a detailed and comprehensive fashion and their comments, if sufficiently precise in legal terms, would help guide the Commission in dealing with the key issues of a given draft.

10. In addition, the General Assembly might choose to intervene more boldly in the organization of the Commission's work identifying priorities among its topics and even removing items from its agenda as the need arose.

11. His delegation believed that the General Assembly should decide to establish an open-ended sessional ad hoc working group of the Sixth Committee at its fifty-first session with the broad mandate to review the codification process in the United Nations system and that States should be invited to offer comments on that issue in time for consideration by the ad hoc working group in 1996. He hoped that a resolution could be adopted on that issue by consensus.

12. Mr. JACOVIDES (Cyprus) noted that at its 1995 session the International Law Commission had made progress on part three of the draft articles on State responsibility, concerning the question of the settlement of disputes; in that connection, his delegation wished to reiterate its position that all multilateral law-making treaties concluded under United Nations auspices should include an effective and expeditious third-party dispute settlement procedure. While recognizing that difficulties remained, his delegation urged the Commission to complete its work on State responsibility as soon as possible.

13. The Commission had decided to propose "Diplomatic protection" as a new topic for inclusion on its agenda and to prepare a feasibility study on a topic provisionally entitled "Rights and duties of States for the protection of the environment". The first of those topics was closely related to State responsibility; the second was of great current relevance. His delegation would, therefore, have no difficulty in endorsing the Commission's recommendations in that regard. It wished, however, to maintain the position it had already taken with regard to additional topics and, in particular, on the need to clarify in an appropriate way the substantive contents of jus cogens.

14. Also noteworthy was the successful holding of the International Law Seminar, the value and utility of which had been established beyond any doubt. The Commission had continued its fruitful cooperation with regional bodies, which played an important role in developing rules of international law in the regional context. Groups such as the Non-Aligned Movement and the Commonwealth could help in a broader context to develop rules of international law on appropriate topics, such as the United Nations Decade of International Law and the convening of a peace conference in The Hague in 1999.

15. In his view, the task of the Sixth Committee was not to involve itself in the details of the work of the Commission or make drafting recommendations to it but to make general observations and provide evaluations on matters of legal policy, thus offering the Commission political direction and guidance.

16. The draft Code of Crimes against the Peace and Security of Mankind and the related subjects of an international criminal jurisdiction and the definition of aggression had a long and torturous history within the United Nations system, dating back to 1947. His delegation had long advocated the adoption of the Code as a complete legal instrument, to include crimes, penalties and jurisdiction. Such an instrument would serve to deter or punish violators of its provisions.

17. The draft Code, as adopted by the Commission on first reading in 1991, was very broad. In the past three years, the Commission had concentrated less on the substantive contents of the Code and more on the question of the establishment of an international criminal jurisdiction. The members of the Commission, including the Special Rapporteur on the topic of the draft Code,

had been aware of the need, during the second reading, to concentrate on well-understood and legally definable crimes and to produce a defensible and lean draft text, in order to gain the widest possible acceptance by States. In that and similar cases, the Commission had to walk a fine line. While it was not authorized to legislate, its mandate went beyond mere codification to progressive development. The extent to which a topic might be progressively developed depended on a careful weighing of the factors involved in each particular case. In the final analysis, ascertaining what projects States would accept was a matter of political judgement. There were, unfortunately, a number of recent examples in which draft texts completed after painstaking work in the Commission had not been accepted by States. The observations in that regard made earlier by the representative of Austria merited serious consideration.

18. Of the twelve crimes contained in the draft Code as adopted on first reading only six had been retained, some of them in an amended forum. Nevertheless, aside from its reservations with regard to certain drafting and substantive points, his delegation endorsed the course taken by the Commission. It would only caution that any surgery performed on the draft Code should not be excessive.

19. With regard to the proposed deletion from the draft Code of certain crimes, it was true that concepts such as intervention or the threat of aggression lacked the precision and rigour required by criminal law. Those crimes, as well as that of mercenary activity, could still be included under the remaining articles on aggression or terrorism. Non-intervention was recognized as a fundamental principle of international law in international instruments, the practice of the International Court of Justice and in General Assembly resolutions. The fact that intervention would no longer represent a separate category under the draft Code would in no way diminish the validity of the principle. While colonial domination and other forms of alien domination were abhorrent and unacceptable, it was to be hoped that such actions were a matter of the past; if included in the draft Code, they would not have a realistic chance of acceptance by States. Serious damage to the environment was, under article 19 of the draft articles on State responsibility, an international crime. It was clear that situations could be envisaged - wilful nuclear pollution or poisoning of vital international watercourses, for example - which might affect international peace and security. Such actions might be punishable under the other articles of the draft Code, thereby eliminating the need to make wilful and severe damage to the environment a separate category.

20. The prohibition and condemnation of apartheid remained a valid principle of international law. The political changes in South Africa meant that apartheid no longer met the criteria for inclusion in the draft Code. The world was not, however, free from institutionalized racial or ethnic discrimination. It was important that such actions should be included under one of the other articles of the draft Code as massive and systematic violations of human rights, in order to prevent their continuation or emergence in other contexts.

21. There could be no doubt about including the crime of aggression in the draft Code. Aggression, by its very nature and in the light of the legislative history of the draft Code, was a key element of the latter. Much time and effort had been spent by the United Nations system on defining aggression, which

had culminated in the adoption in 1974 of General Assembly resolution 3314 (XXIX). The proposed definition of aggression rested mainly - and with perfect justification - on that contained in resolution 3314 (XXIX). A current view in the Commission, supported by distinguished jurists, was that the concept of aggression was legally undefinable. In their written comments, Governments had widely supported the view that resolution 3314 (XXIX) had been intended to serve as a guide for political organs of the United Nations and was accordingly inappropriate as the basis for criminal prosecution before a judicial body. On the clear understanding that resolution 3314 (XXIX) continued to provide a valid definition of aggression, his delegation would be willing to endorse the new draft article on aggression (article 15) proposed by the Special Rapporteur, which limited itself to referring to only one paragraph of resolution 3314 (XXIX), reading: "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". That formulation was based on Article 2, paragraph 4, of the Charter, which according to the prevailing view provided the clearest example of jus cogens and could hardly be disputed.

22. With the adoption of the Charter and earlier instruments making war illegal, it was no longer necessary to make a distinction between "acts of aggression" and "wars of aggression". Acts of aggression, such as the invasion or annexation of territory, were not simply wrongful acts and were sufficiently serious to constitute crimes under the draft Code.

23. Genocide was the least problematic of the crimes proposed for inclusion in the current version of the draft Code. General agreement on the definition of genocide was based on general acceptance of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The points raised by Governments in their written comments could largely be met by interpretative statements. The United Kingdom had pointed out the relationship between the draft Code and article IX of the Genocide Convention, which provided for the compulsory jurisdiction of the International Court of Justice in the case of disputes between contracting parties relating to the responsibility of a State for genocide, and that was a welcome reminder of the need to accept compulsory third-party settlement in all multilateral law-making conventions. His delegation therefore endorsed the proposed draft article on genocide (article 19), leaving room for possible drafting changes.

24. The third crime proposed for inclusion in the current version of the draft had been adopted on first reading in 1991 as article 21 ("Systematic or mass violations of human rights"). In response to the comments of Governments and in view of further inquiry into the relevant jurisprudence, the title of the article had been changed to "Crimes against humanity". While not convinced of the need for that change, his delegation was willing to accept it. However, it wished to point out that the reference to "mass violations" had been intended to indicate the gravity of the offence. The Commission and the Drafting Committee might wish to consider the matter further.

25. Draft article 21, as currently proposed, contained a list of acts which, when committed systematically, would constitute a crime against humanity. His delegation endorsed the decision to retain the act of deportation or forcible

transfer of population, which had been included in the earlier version of the article. Institutionalized racial or ethnic discrimination could be added to the list to compensate for the proposed deletion of the crime of apartheid from the draft Code. Consideration should also be given to including in article 21 an appropriate reference to the practice of the systematic disappearance of persons, which was a major humanitarian concern in many parts of the world.

26. The fourth crime proposed for inclusion in the Code had been provisionally adopted on first reading as article 22 (Exceptionally serious war crimes). In the current version, the title had been changed to "War crimes" and some substantive changes had also been made, in response to the conclusions by the Special Rapporteur that the reservations expressed concerning the new concept of exceptionally serious war crimes were valid and that it was difficult, in practice, to establish a clear dividing line between the "grave breaches" defined in the 1949 Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" specified in the draft article as adopted on first reading.

27. The Special Rapporteur's conclusions in that regard gave rise to some difficulties. In the course of its debate on the jurisdiction of an international criminal court, the Sixth Committee had expressed a strong preference for the formulation as it had appeared in articles 21 and 22 of the draft Code, as adopted on first reading. In particular, it was his delegation's view that paragraph 2 (b) of article 22 (as adopted on first reading), which read "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" and which had received considerable support, should be retained in the current version. Although "ethnic cleansing" was not a legal term, it was universally understood. Appendix II to paragraph 4 of the 1977 Protocol I additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts, rightly prohibited the "transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". Thus, the corresponding reference in the 1991 version of draft article 22 was solidly grounded and should be included in the new text in some appropriate way, even though the current version of article 22 already had certain formulations tending in that direction.

28. The fifth crime proposed for inclusion in the Code was "International terrorism". On the basis of the comments of Governments and his own views, the Special Rapporteur had added to the list of perpetrators private individuals acting on behalf of groups or associations. Bearing in mind recent acts of international and national terrorism, that appeared to be the right approach. While there was still no generally acceptable definition of terrorism and the piecemeal approach of identifying specific categories of acts which were condemned by the entire international community was a practical way of combating terrorism, the crime of terrorism should, nevertheless, be included in the draft Code, along with common rules applicable to all forms of terrorism, for the purpose of suppressing and punishing such acts. Although not perfect, the current version of article 24 was moving in the right direction.

29. The sixth, and last, crime proposed for inclusion in the Code was "Illicit traffic in narcotic drugs". Governments, in particular those of Australia and Sweden, had made some valid points in their written comments on the corresponding article, as adopted on first reading. Indeed, close scrutiny needed to be given to the relationship of the article with existing conventions such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ways of implementing mutual legal assistance among States to prosecute offenders and prevent money-laundering, and the relationship between the jurisdiction of national legal systems and the proposed international criminal jurisdiction. Doubts had been expressed as to whether it was appropriate to include illicit traffic in narcotic drugs as a crime under the draft Code. Yet, narco-terrorism could have a destabilizing effect on some countries, in particular those in the Caribbean region, which strongly advocated its inclusion. Drug trafficking, whether carried out by agents of a State, individuals, or organizations, could also negatively affect international relations. For those reasons, his delegation urged that every effort should be made to achieve a satisfactory outcome on that important issue.

30. Ms. de BRICHAMBAUT (France) said that not every major infraction of international law or morally reprehensible act could be defined as a crime against the peace and security of mankind. In order to be included in the list of crimes in the draft Code, such infractions must correspond to the legal rules accepted by States, must be considered serious enough to be defined as crimes against the peace and security of mankind, and must refer to acts sufficiently identifiable to appear in a criminal text. The matter should be dealt with only from a legal, not a political, perspective.

31. He was pleased with the Special Rapporteur's decision to restrict the draft Code to six crimes, thus meeting the concern of those delegations including his own, which had felt it important to avoid devaluing the concept of crimes against the peace and security of mankind. Crimes incapable of precise definition or which had political rather than legal implications should not be included in the Code. However reprehensible, the threat of aggression (article 16); intervention (article 17); colonial domination and other forms of alien domination (article 18); apartheid (article 20); the recruitment, use, financing and training of mercenaries (article 23); and wilful and severe damage to the environment (article 26) had no place in the Code and could only impede the preparation of a generally acceptable project.

32. The Special Rapporteur had replaced the original definition of aggression, which had been implicitly based on General Assembly resolution 3314 (XXIX) and had caused disagreement within the Commission. The original definition had been intended for a political body, and its inclusion in a legal document would raise substantive problems. However, despite the simplicity of the new wording, it was unclear whether progress had been made. The Security Council's role in the definition of aggression was a crucial one, yet the new version made no reference to the relevant provisions of the Charter. As several members of the Commission had pointed out, judicial authorities might consider that an act constituted aggression and hence a crime against the peace and security of mankind while the Security Council, which was primarily responsible for the maintenance of international peace and security under the Charter, might disagree. The Commission would move more quickly if it accepted as aggression

any act determined as such by the Security Council rather than seeking to define the phenomenon.

33. The modification of article 19 to include incitement to commit genocide and the attempt to commit genocide was justified by the extreme gravity of the crime. France approved of the suggestion that the title of article 21 should be changed from "Systematic or mass violations of human rights" to "Crimes against humanity". The change reflected the wording used in public international law and the Charter of the Nürnburg Tribunal and the statute of the International Criminal Tribunal for the former Yugoslavia. However, as some members of the Commission had noted, it would be preferable to consider only crimes committed in a situation of armed conflict and intentionally aimed at a civilian population.

34. The Special Rapporteur had suggested that article 22, "Exceptionally serious war crimes" should be retitled "War crimes". France had always maintained that war crimes should not necessarily be grouped with crimes against the peace and security of mankind and would prefer that only the most serious war crimes should be covered under the Code. However, it was important to define such crimes correctly, and in that regard the new text proposed by the Special Rapporteur, which defined war crimes as "grave breaches of the Geneva Conventions of 1949", had merit. France did not share the opinion of certain members of the Commission who had suggested mentioning other international instruments, particularly Additional Protocol I to the Geneva Conventions. However, since the Protocol was generally conventional in nature and had only limited customary value in public international law, its inclusion in the definition of war crimes might impede France's acceptance of the Code.

35. The Special Rapporteur had also retained the crimes of international terrorism and the illicit traffic in narcotic drugs. While the French delegation understood the Commission's interest in such heinous crimes, it had doubts regarding their inclusion in the draft Code. Moreover, the Commission would inevitably encounter the problem defining terrorism, on which there was currently no consensus among States.

36. His delegation was therefore pleased that the Commission had decided to refer to the Drafting Committee only the articles concerned with aggression, genocide, systematic or mass violations of human rights, and exceptionally serious war crimes; that decision demonstrated that the Commission was directing its work towards a realistic, rather than a political concept of crimes against the peace and security of mankind. However, the decision to continue consultations on article 25 (Illicit traffic in narcotic drugs) and article 26 (Wilful and severe damage to the environment) was unlikely to produce results since those were not crimes against the peace and security of mankind. The Commission had also asked the Drafting Committee to include in the definition of the crimes to be covered under the Code the relevant elements of the crimes that had been eliminated from it. Such a course could only increase the difficulties and delay the conclusion of the Commission's work.

37. He was also uncertain whether the Special Rapporteur and the Commission had been right to abandon any attempt to formulate a conceptual definition of crimes against the peace and security of mankind. While it had been a pragmatic

decision to list such crimes before attempting to define them, it was time to consider a conceptual definition, which would give greater stability to the Code, particularly if the goal was to draw up a list of crimes which might subsequently be revised.

38. Mr. CALERO RODRIGUES (Brazil) said that the Commission, in its haste to prepare the draft Code for its second reading by the 1996 deadline, might produce an inferior set of articles, as had been the case with the draft prepared for the first reading in 1991. During the past year, the Drafting Committee had approved several articles of part I, dealing with general principles, and two articles of part II, dealing with the definition of crimes, while the Commission itself had been unable to approve any articles. It had been a mistake to deal simultaneously with both topics; priority should have been given to the adoption of part II, which would have been of particular assistance to the work on the international criminal court. Some delegations in the Ad Hoc Committee on the establishment of that court had emphasized the importance of accelerating work on the draft Code. The Ad Hoc Committee had many organizational and procedural issues to consider, and its task would be rendered even more difficult and time-consuming if it also had to consider in depth the question of the substantive law to be applicable. The elements of that law were contained in various international instruments, and could be consolidated - with improved wording where necessary - in the draft Code, thus assisting the Ad Hoc Committee and eventually, the court. He feared that it would be impossible to complete work on both parts of the Code and also complete the first reading of the articles on State responsibility in the three weeks scheduled for the next session of the Commission. The Commission should concentrate on part II rather than fail altogether or produce inferior texts.

39. He welcomed the proposal of the Special Rapporteur to eliminate from the Code several articles which had appeared in the earlier version. Since aggression was perhaps the most serious example of wrongful conduct on the part of a State, it was logical to hold responsible individuals who led a State to commit aggression; however, it would be excessive to apply the same criterion to the mere threat of aggression. Intervention was too vague a concept to appear in the Code, while colonial domination was a political fact and it would be virtually impossible to indicate a precise action for which individuals could be incriminated. The inculpation of individuals for damage to the environment would better be left to national laws, which might have to conform to international standards, and the recruitment, use, financing and training of mercenaries were too topical to be included in the Code. The Special Rapporteur had not included apartheid among the crimes retained in the Code, but he had clearly been reluctant to eliminate that crime. The Brazilian delegation shared that hesitation and suggested that in view of its historical connotations, the word "apartheid" should be replaced by a more widely applicable formulation.

40. Since the six remaining crimes were the most inexcusable, it was imperative that the Code should be drafted with the utmost precision. A number of improvements to the text of Part II seemed called for; for that reason, it was particularly important that there should be no pressure to complete part I.

41. The omission of six paragraphs from the proposed text on aggression (article 15) was an improvement. It was important to remember that the article

dealt with the conduct of an individual, which was necessarily linked to that of a State. However, the Code need not deal with aggression by a State, which was defined elsewhere, but must indicate as clearly as possible the conditions under which an individual was liable for his contribution to aggression by a State.

42. With regard to the use of the expression "crimes against humanity" in article 21 to replace "systematic and massive violations of human rights", he reminded the Commission that all the acts described in that article had been taken from the Charter of the Nürnberg Tribunal and were widely recognized. However, in formulating the Nürnberg principles, the Commission had asserted that to be considered a crime against humanity, an act must have been committed in execution of or in connection with any crime against peace or any war crime. He wondered whether the Commission wished to maintain that limitation or whether it felt that the concept had evolved during the past 50 years and that the category of crimes against humanity had acquired an independent status.

43. Mr. PASTOR RIDRUEJO (Spain) said that the drafting of the Code of Crimes against the Peace and Security of Mankind gave rise to complex political problems. Because of institutional and other shortcomings, a significant number of States were not yet sufficiently politically mature to adopt and apply the Code, hence the slow progress and uncertain future of the Commission's work on the item. However, even if the Commission's work did not lead to an international convention that would be binding on a significant number of States - although that would be the desirable outcome - the ideas that had emerged could facilitate the adoption of another type of instrument, such as a declaration or model principles, as referred to in paragraph 46 of the report. That would be an important step towards developing morality in international law.

44. The criterion followed by the Special Rapporteur in reducing the list of crimes from twelve to six seemed realistic and reasonable in principle, although the vague wording could give rise to difficulties in practice, and his delegation could accept, in principle, the exclusion of the six crimes from the list on the basis of that criterion. It took note of the Special Rapporteur's comment, in paragraph 130 of the report, that a consensus had developed in favour of including four articles; those on aggression, genocide, war crimes and crimes against humanity, which constituted the core of the list of crimes. His delegation therefore supported the Commission's decision to refer articles 15, 19, 21 and 22 to the Drafting Committee.

45. His delegation supported article 2 of the Code. However, in view of the need for coordination between international law and national law, and to avoid any ambiguity, the obligation of States parties to the convention to adapt their criminal legislation to the commitments undertaken in the convention must be ensured. It was not reasonable that an action characterized as an international crime under the Code would not be punishable under the legislation of a State party to the Code. His delegation therefore suggested that the following words should be added at the end of the second sentence of article 2: "... without prejudice to the obligation of the States parties to adapt their legislation to the provisions of this Code".

46. With regard to article 21, his delegation preferred the title "Systematic or mass violations of human rights" to "Crimes against humanity", since other crimes in the Code could also be regarded as crimes against humanity, particularly genocide and war crimes. His delegation believed that the crime of forced and involuntary disappearances should be specifically mentioned in article 21.

47. Mr. HARPER (United States of America) said that the 1995 session of the International Law Commission had been particularly noteworthy for the work begun on two important new topics, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". The Commission had also made progress on existing topics.

48. Although the reservations regime in the three Vienna Conventions on the law of treaties was not perfect, the Special Rapporteur on reservations to treaties had rightly pointed out in his report that its flexibility had facilitated broad accession to multilateral treaties. The United States had therefore been pleased to read that all Commission members had agreed that the definition of "reservation" and the rules contained in article 2, paragraph 1 (d), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions, and article 20 of the 1978 Vienna Convention were invaluable and should be preserved as far as possible.

49. The United States agreed that the Commission's task should be to fill in gaps and clarify ambiguities. The best way to do that might be for the Commission to draft guidelines to facilitate the resolution of specific problems without adding greater rigidity to the law. Whether such guidelines might usefully be supplemented by model clauses could be determined at a later date.

50. Paragraphs 138-142 of the Special Rapporteur's report had discussed reservations to human rights treaties, a matter on which the United States Government held strong views. His delegation believed that the Commission had been right when it decided in 1966 to reject a lex specialis for reservations to certain kinds of treaties. In that respect, the Vienna Conferences which had adopted the Commission's recommendations had acted wisely.

51. Consequently, the United States could not accept the Human Rights Committee's views in its General Comment No. 24 (52), since it did not believe that the classic rules on reservations were inadequate for human rights treaties. On the contrary, they had helped to advance the fundamental objective of broad participation by States. The critical role of States - as opposed to the Human Rights Committee - in determining matters related to such treaties should be respected on both legal and practical grounds.

52. The United States did not agree that it legally fell to the Human Rights Committee to determine whether a specific reservation was compatible with the object and purpose of the International Covenant on Civil and Political Rights. The further assertion that if the Committee were to decide that a reservation was not compatible, that reservation would generally be severable in the sense that the Covenant would be operative for the reserving party without the benefit of the reservation, also had no basis in international law.

53. That claim contradicted the fundamental rule reflected in article 38, paragraph 1, of the Statute of the International Court of Justice, which held that international conventions established rules "expressly recognized by" contracting States. A State that had made a reservation to a rule in acceding to a convention could hardly be held to have "expressly recognized" that rule. On a more practical level, he wondered how many Committee members in their capacity as legal advisers would be willing to recommend that their parliaments should consent to ratification of a class of treaties to which the parliament wished to attach reservations, if they knew that international bodies established by such treaties might ignore the reservations and consider their country bound without them.

54. The Commission's work on the topic entitled "State succession and its impact on the nationality of natural and legal persons", could lead to a sound evolution of international law to enhance the protection of individuals and discourage statelessness. The Special Rapporteur's report had indicated the limits to the analogy between the nationality of individuals and the nationality of legal persons or corporations. The Special Rapporteur had questioned whether the Commission should give priority to studying the impact of State succession on the nationality of natural persons - the more urgent and easier problem - over that of legal persons. The United States was inclined to believe that it should.

55. Chapter VII of the Special Rapporteur's report dealt with continuity of nationality. The Special Rapporteur had not expected the regime of diplomatic protection to be placed on the Commission's agenda in the near future, and he had accordingly proposed to analyse the continuity of nationality in the context of his work. However, the Commission had proposed that it should begin work on the topic of diplomatic protection in the near future, and if that was accepted, the United States would suggest the desirability of taking up continuity of nationality as part of the work on that topic.

56. Regarding the matter of State responsibility, the United States Government continued to have serious difficulties and questions in certain areas, especially with regard to responsibility for so-called international "crimes" and the complex subject of dispute settlement.

57. By a divided vote, the Commission had decided to refer to the Drafting Committee the Special Rapporteur's proposals on the supposed consequences of so-called "State crimes". The United States had repeatedly stated that it had serious reservations about the very concept of international State crimes. The concept found little support in contemporary State practice, and it confused rather than clarified the analysis of particular situations. It did not acknowledge the range of contexts and situations in which the international community had to characterize and respond to State behaviour.

58. It was inappropriate and unproductive for the Commission to try to weave new rules concerning so-called international "crimes" by States into the fabric of State responsibility law. Such an effort would be the enemy of progress towards the completion of the first reading on the draft articles on the topic. The United States did not support continued work on the Special Rapporteur's elaborate proposed regime regarding the consequences of State "crimes".

59. His delegation also had doubts regarding the elaborate proposals for regimes for dispute settlement, both the general regime under the State responsibility articles and the regime for settlement of disputes involving international delicts and countermeasures in response.

60. The peaceful settlement of disputes was important, and the United States had taken part in a wide variety of dispute settlement procedures. That very experience had made his Government doubt efforts to channel disputes involving matters as broad and complex as those under discussion into a narrow range of predefined settlement mechanisms. Experience had shown that the range of legal and factual circumstances giving rise to disputes involving State responsibility was both varied and difficult to predict. Accordingly, it was impossible responsibly to agree beforehand to any particular rigid form of settlement.

61. His Government's concern extended to future disputes under the draft articles in general, for which the draft had contemplated conciliation. It also applied to the binding settlement regime proposed by the Special Rapporteur where one party had taken countermeasures. In such situations it was important for the parties to seek a peaceful settlement; their past inability to do so might have been part of the legal justification for the countermeasures. Nevertheless, the wide range of potential disputes required the parties to be flexible in devising dispute settlement mechanisms appropriate to particular circumstances.

62. The United States therefore believed that the current mandatory progression through various dispute settlement mechanisms was not appropriate, and urged that any dispute settlement mechanisms should be made optional for the parties to the dispute.

63. Regarding the draft Code of Crimes, the United States had long expressed reservations about the entire effort to develop such a code. In recent sessions of the Commission, the draft Code had evolved in such a way as to lessen some of those concerns.

64. While welcoming the Special Rapporteur's indication that he intended to limit the list of crimes to those whose inclusion would be hard to challenge, namely aggression, genocide, war crimes, crimes against humanity, international terrorism and illicit traffic in narcotic drugs, his delegation, like several others, particularly questioned inclusion of the last two. He also had doubts about proposals to add "environmental crimes".

65. Each of the four remaining crimes posed problems of definition and drafting, but the United States wished to register particular concern about the definition of the crime of aggression. The Commission had drawn from General Assembly resolution 3314 (XXIX) and Article 2, paragraph 4, of the Charter, neither of which provided a sufficient basis for drafting a criminal law definition or reflected the historical roots of the crime of waging aggressive war in the aftermath of the Second World War.

66. Two specific difficulties had presented themselves. It was incorrect to say that any use of force against the territorial integrity or political independence of any State could be equated with an act of aggression under

Article 39 of the Charter. The crime had been defined much too broadly and could encompass even minor intrusions or violations of territorial integrity. Certain intrusions without the permission of an affected State might be necessary to conduct non-combatant evacuation operations, hostage rescue or demonstrations of navigational or overflight rights under international law. Such actions were not, and could not be rendered, criminal acts.

67. While appreciating the difficulties inherent in drafting a code of crimes, the United States considered it essential to take the time required to achieve accuracy and to ensure that the result was fully satisfactory. The Commission's energies had recently been directed towards the task of drafting a statute for an international criminal court. His delegation believed that those deliberations had reached a critical phase and that any attempt to link the code of crimes, with its many controversial elements, to the court would only detract from or even retard progress in that sphere.

68. Regarding the Commission's effort to devise possible liability regimes for the injurious consequences of activities not prohibited by international law, he said that the United States was again urging caution. Existing State practice and agreements already concluded or under negotiation suggested a need for liability regimes closely tailored to the particular circumstances of the activity in question and the parties involved. Very broad general rules or binding guidelines regarding liability might not always be appropriate.

69. In seeking to fuse concepts of environmental impact assessment and liability, the Commission had raised many difficult issues, including the respective responsibilities of the State and of operators, the types of activities or substances to which any liability regime might apply, and the types of harm that a regime might address. Further work was required, and the United States urged that such work should be focused on the areas most likely to command consensus.

70. In that connection, he noted that the draft articles sought to impose an obligation on States to set up procedures for regulation and environmental impact assessment of all activities, public or private, that might potentially cause harmful transboundary effects, and could therefore be argued to imply State liability for all such harmful effects. Such a broadly drawn regulatory approach was unacceptable, and therefore the Commission would do better to focus on particularly hazardous activities with a view to producing a consensus document.

71. Mr. SANGIAMBUT (Thailand) noted with appreciation the progress made by the Commission during its forty-seventh session on the draft Code of Crimes against the Peace and Security of Mankind. His delegation believed that the Code should take the form of a convention containing sufficiently precise provisions to ensure its effective implementation in the prosecution of individuals.

72. His delegation believed that four crimes should be incorporated in the Code, namely aggression, genocide, war crimes and crimes against humanity. Other crimes might be included in the list at a later stage following a consensus decision to incorporate them.

73. Regarding draft article 3, concerning responsibility and punishment, his Government had requested that the definitions of crimes provided in article 3, paragraph 2, should be worded along the same lines as article 3, paragraph 3, so as to incorporate the notion of attempting to commit those crimes.

74. Mr. VILLAGRAN KRAMER (Guatemala) said that the Commission had made a great deal of progress on the draft Code; at the same time, the Code had been somewhat diminished by the cutting of major sections, and there was a risk that that process of truncation might continue. The Commission's major achievements were the clarification, for the purposes of the application of the Code, of the principles aut dedere aut judicare and non bis in idem, and the definition of the Code's sphere of international application by national and international courts; those advances were invaluable in view of the sensitivity of the problems which arose regarding the extradition of persons accused of international crimes.

75. It was significant that the Commission had asked the Drafting Committee, at its discretion, to deal with articles 17, 18, 20, 23 and 24; the Commission clearly felt that it was important to reconsider those crimes from a global perspective and from the point of view of their components. However, the report did not reveal whether, in establishing a working group to take up the issues of illicit traffic in narcotic drugs and wilful and severe damage to the environment, the Commission attached the same importance to those crimes as to other crimes.

76. His delegation felt that the Commission's consideration of the crime of aggression had been realistic and constructive. However, the Commission should go further and, on the basis of Article 39 of the Charter and General Assembly resolution 3314 (XXIX) on the Definition of Aggression, determine which acts constituted aggression and, most importantly, whether it was the State, the individual, or both, which committed aggression. Politically, the Definition of Aggression in General Assembly resolution 3314 (XXIX) was very broad; however, that definition reflected the reality of the bipolarity which had existed between super-Powers and could reappear. The States of the Americas, including the United States of America, had incorporated that definition in the Protocol of Amendments to the Inter-American Treaty of Reciprocal Assistance, so that the definition had entered the realm of treaty law and should be taken into account by the Commission.

77. With regard to the crime of genocide, a significant distinction had been made, in the draft statute for an international criminal court, between genocide under the treaty law which had originally defined it and genocide as an international crime under general international law. Whether or not it was included in the Code, genocide clearly constituted an international crime. His delegation supported the Commission's clarifications on the subject.

78. Although the crime of apartheid had originally been limited to South Africa, and the causes which had given rise to it had been eliminated, the crime as such had not disappeared; acts and policies which constituted apartheid must be regarded as international crimes. It was to be hoped that apartheid would not resurface elsewhere in the world.

79. Intervention should not be discarded as a possible international crime. From the point of view of lex lata, intervention did not constitute an international crime. However, from the point of view of the progressive codification of international law, the fact that it was a violation of an international obligation meant that it could be regarded as an international crime, especially since, as in the case of aggression, individuals who decided to intervene, and resorted to the threat or use of force, did so under the protection of the State.

80. With regard to systematic or mass violations of human rights, his delegation was in favour of entitling draft article 21 "Crimes against humanity", not only because it left aside the question of the scale of such crimes, but also because it allowed for the possibility of regarding forced disappearances of persons as an international crime. Although the Inter-American Court of Human Rights, in the Velasquez Rodriguez case in 1987, had regarded forced disappearances of persons as grave violations of human rights, entailing to the international responsibility of the State, the Court had not termed such disappearances an international crime. At all events, the subject should be considered in greater depth, in the context of the progressive development of international law.

81. His delegation could accept the list of crimes against humanity in draft article 21. However, the phrase "all other inhumane acts", stricto juris, was very vague and elastic and, to some extent, was influenced by geography, since attitudes varied in different parts of the world as to what acts were inhumane.

82. With regard to exceptionally serious war crimes, dealt with in draft article 22, his delegation was in favour of the Special Rapporteur's decision to revert to the traditional notion of war crimes, on the basis of the 1949 Geneva Conventions and also the statutes of the criminal tribunals for the former Yugoslavia and for Rwanda. It was not necessary to include all the cases envisaged in the Geneva Conventions, but only those that were grave violations.

83. His delegation was in favour of maintaining international terrorism, illicit traffic in narcotic drugs and wilful and severe damage to the environment as international crimes in view of the magnitude and severity of the damage and injury they caused. Illicit traffic in narcotic drugs referred to international traffic between neighbouring countries and between distant countries by air or sea, regardless of whether such traffic crossed the territorial sea of other countries, the high seas or national or international air space. The damage caused and the family and political instability generated must be addressed at the legal level and conflicts of jurisdiction must be resolved. The international community must be able to combat such traffic legally, under the principle aut dedere, aut judicare. His delegation believed that the arguments put forward by the Special Rapporteur regarding wilful and severe damage to the environment should be accepted by the Commission.

84. His delegation agreed that draft article 5, on responsibility of States, should be retained. The essential point was that the article did not exclude the responsibility of the State for damage caused by its agents in consequence of their criminal acts, taking into account, in addition, article XV of the Convention on the Prevention and Punishment of the Crime of Genocide. As to

penalties, it was clear that the Commission was not in favour of criminalizing the State. However, there could be situations in which a State was involved in an international crime, for example, aggression or State terrorism. His delegation believed that criminal responsibility lay exclusively with the individuals who committed the international crime and that if any criminal responsibility could be attributed to a State, penalties would have to be specified. The application of the principle societas delinquere non potest ruled out punitive sanctions; under international treaty law - the Charter of the United Nations - sanctions could be imposed by the Security Council; and general international law provided for the international responsibility of the State. Sooner or later the Committee would have to take up the sensitive problem of State responsibility in relation to the international crimes included in the Code.

The meeting rose at 12.45 p.m.

UNITED NATIONS
General Assembly

FIFTIETH SESSION
Official Records

SIXTH COMMITTEE
14th meeting
held on
Monday, 16 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 14th MEETING

Chairman: Mr. LEHMANN (Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued)

Address by the President of the International Court of Justice

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The meeting was called to order at 10.35 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CHEN Shiqiu (China) said that the adoption of norms to prevent and punish international crimes against the conscience and survival of mankind was an extremely important and politically sensitive task, since the different criminal law theories and practices of various countries had to be borne in mind and since it was essentially a question of the progressive development of international law.

2. The first task at hand was to define the scope of the crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind. His Government had always felt that only the most serious international crimes should be included, and therefore appreciated the fact that the International Law Commission appeared to be reaching a consensus in that regard. In order to overcome disagreement as to the specific crimes that should be included, objective criteria must be applied: the crimes should be those that were directed against the fundamental interests of the international community and the conscience of mankind and consequently threatened peace and security; they should also be sufficiently serious to justify the concern of the entire international community.

3. In the light of those criteria, he believed that the Code ought to include genocide, although the definition of that crime needed to be improved taking into account the views of various countries. As for the crime of aggression, its inclusion depended on whether agreement could be reached on its definition, a question which was closely linked to the provisions of the Charter of the United Nations relating to the mandate of the Security Council. Since the Code would probably be used by the international criminal court, it might be necessary to include the relevant provisions either in the definition of aggression or in the general principles of the Code. The problem of harmonizing the Code and the draft statute of the court would arise in the future.

4. The question of whether the Code should include systematic or massive violations of human rights or crimes against humanity needed to be studied in greater depth. The definition of those crimes was, in fact, rather vague. Moreover, if the definitions contained in the draft adopted on first reading were used, many acts which did not have grave consequences for the world and could be dealt with by domestic law courts would be included in the Code. Lastly, crimes against humanity were generally linked to wars and armed conflict, and there were insufficient grounds for extending their application to times of peace.

5. Crimes which constituted serious violations of the rules and conduct of war could be included. As to the inclusion of other crimes, such as international terrorism and drug trafficking, a full exchange of views on the question was necessary.

6. Mr. YAMADA (Japan) said that his Government followed with interest the work on a draft Code of Crimes against the Peace and Security of Mankind, which would be an essential part of the international criminal law that was to be applied by the proposed international criminal court.

7. With regard to the crimes to be included in the draft Code, he felt that it had been a wise decision to limit the list. A restrictive approach would increase the acceptability of the Code and contribute to its universality, which would be of great importance when the draft Code was adopted as a treaty.

8. Bearing in mind the maxim nullum crimen, nulla poena sine lege, every effort must be made to ensure that the definition of each crime conformed to the standards of precision and rigour required by domestic criminal law. In defining crimes such as genocide, it was necessary to refer to the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and other treaties. His Government was disturbed by the fact that the Code used such vague wording as "all other inhumane acts" in discussing the crime of violations of human rights and that it did not define the scope of war crimes precisely enough.

9. He recalled that it had been difficult to reach agreement on the concept of "aggression". It was necessary to elaborate a precise definition of individual criminal responsibility, since the definition adopted by the General Assembly in its resolution 3314 (XXIX) referred to aggression by a State and was not relevant. Under Article 39 of the Charter of the United Nations, the Security Council had responsibility for determining whether an act of aggression had been committed and, in the view of his Government, a determination by the Council that an act of aggression had taken place was a prerequisite for the commencement of trial proceedings relating to the crime of aggression.

10. Concerning applicable penalties, the Commission seemed to prefer the adoption of one set of maximum and minimum penalties applicable to all crimes. However, the matter should be studied further since, in accordance with the principle of legality, the type and content of punishment must be determined in the light of the constituent elements of each crime.

11. Turning to the subject of general principles, he said that the principle of non bis in idem merited further study, since the current wording of draft article 9 might contradict the constitutional provisions of some Member States. Other principles, such as complicity and attempt, which appeared in article 3, and culpability requirements, referred to in articles 11 to 13, must also be given serious study.

12. In principle, the reference to domestic law and international law in draft article 1, paragraph 2, and the wording of draft article 6, on the "obligation to try or extradite", article 8, on judicial guarantees, and article 10, on non-retroactivity, were acceptable to his Government. Further consideration was necessary, however, to keep those principles in line with the draft statute of an international criminal court, the International Covenants on Human Rights and the world's various legal systems.

13. Last, referring to the relationship between the draft Code of Crimes and the draft statute of an international criminal court, he said that the former was meant to provide substantive international criminal laws so that the latter could determine individual criminal responsibility for those crimes. If the crimes were defined in both instruments, not only would the work of the General Assembly be duplicated, but there might be discrepancies between the two instruments, which would hamper the effective functioning of the international criminal court. The principles of non bis in idem and non-retroactivity must also be identical in both instruments.

14. Mr. BIGGAR (Ireland) recalled that on 21 November 1947, the General Assembly, in its resolution 177 (II), had directed the International Law Commission to prepare a draft Code of Offences against the peace and security of mankind. Forty-eight years later, it could not be denied that the international legal community had laboured on the draft Code, but neither could it be denied that its efforts had thus far been in vain.

15. In international life acts were committed which were so heinous that their perpetrators must be brought to justice. International law should pronounce on such matters, not only to ensure that justice was done but also to highlight the universal recognition of their extreme seriousness. That process was fraught with obstacles and difficulties and therefore called for a positive and cautious approach in order to balance principle with the practical and to avoid the production of one more document for the archives of jurisprudence.

16. The Code would establish a new system of penal law and must therefore include definitions of the crimes covered, jurisdiction to try the accused, mechanisms to bring him to trial, provisions for trial proceedings, safeguards for the rights of the accused and norms to govern the imposition of penalties in the event of conviction. All of those matters presented difficult problems. In that connection, his Government felt that it would be appropriate to study the relationship between a convention for a code of crimes and the establishment of an international criminal jurisdiction.

17. In principle, his delegation was satisfied with the general direction taken by the work of the Commission. The decision to deal with only 6 of the 12 crimes originally considered was a realistic one.

18. With regard to aggression, some delegations doubted that it would be appropriate for the Security Council to determine, under article 39 of the Charter, whether an act of aggression had taken place. They would rather base their approach to the definition of aggression on General Assembly resolution 3314 (XXIX). On that matter, his delegation felt that, apart from the primacy of the Charter in international law, the realities of international life must be taken into account. The international community could not, therefore, ignore the role and work of the Security Council.

19. In the future it might be necessary to add to or amend the list of crimes. Doubts had been expressed regarding the inclusion of illicit traffic in narcotic drugs. His Government had taken strong measures to fight that crime and would press strongly for its inclusion in any future Code.

20. Mr. ZAIMOV (Bulgaria) welcomed the progress made in the work on the draft Code of Crimes against the Peace and Security of Mankind. The Code was proof that the Commission was capable of meeting the urgent demands of the international community for legal expertise on that question.

21. Bulgaria, which had always supported the establishment of an efficient international mechanism for trying the most serious violations of international law, was committed to the fight against those crimes and was confident that the international criminal court would, in the foreseeable future, become an instrument for deterring the potential perpetrators of such acts.

22. Bulgaria had always stressed the importance of formulating a precise international criminal code that could be applied, not by ad hoc tribunals, but by an international criminal court. The Code should take the form of a draft convention containing provisions that were sufficiently precise to ensure its effective application in the prosecution of individuals.

23. With regard to specific points in the draft text, his delegation could in principle accept the limitation of the list of crimes as proposed by the Special Rapporteur. However, it believed that there were strong arguments for maintaining draft article 26, entitled "Wilful and severe damage to the environment". Such offences might well become a fact of life and, in view of their serious consequences, there was no doubt that they could be characterized as crimes against the peace and security of mankind. His delegation therefore supported the establishment of a working group to prepare a suitable text before the forty-eighth session of the Commission with a view to its inclusion in the draft Code.

24. The Commission should continue to seek broad agreement on objective criteria for defining not only serious international crimes, but also those which qualified as crimes against the peace and security of mankind. Such criteria should be reflected in the Code and should include the extreme seriousness of the crimes and the general agreement of the international community regarding their character as a crime against the peace and security of mankind. There should be consistency between the criteria used to determine such crimes in the draft statute of an international criminal court and those used in the draft Code of Crimes against the Peace and Security of Mankind. It would therefore be useful to establish mechanisms for harmonizing the provisions of the draft Code and the draft statute.

25. Bulgaria shared the opinion that the crime of aggression should be included in the Code and that the definition of aggression contained in General Assembly resolution 3314 (XXIX) was too political and lacked the necessary legal precision. It therefore felt that greater efforts should be made to produce as precise as possible a definition of that term.

26. With regard to draft article 21, Bulgaria agreed in principle with the Special Rapporteur's proposal to revert to the earlier title, "Crimes against humanity", instead of "Systematic or mass violations of human rights", since that term was used in both international and domestic law and was supported by legal doctrine and precedents.

27. With regard to the delicate and important question of penalties, it was important to stress that the Code would be effective only if it included three elements: penalties, crimes and jurisdiction. Accordingly, the best way to proceed would be to establish a scale of penalties and to leave it to the court to decide on the severity of the penalty based on the seriousness of the crime.

28. Mr. VUKAS (Croatia) said that, despite the progress achieved on the draft Code of Crimes against the Peace and Security of Mankind, neither States nor the Commission itself had as yet reached agreement on the main issues, namely, which crimes should be defined as "crimes against the peace and security of mankind", whether the number of such crimes should be limited or increased, and what the legal nature of the document in its final form should be.

29. With regard to the last of those points, his delegation felt that, as in the case of the statutes of the international tribunals for the former Yugoslavia and Rwanda, the Code should be adopted by a resolution of the Security Council, which was the competent body in the matter, since aggression, genocide, crimes against humanity, war crimes and international terrorism were threats to international peace and security.

30. Turning to the crimes defined in the draft Code, he said that although the new, shorter version of the article on aggression proposed by the Special Rapporteur was acceptable to Croatia, his delegation felt that the general definition of the concept set forth in paragraph 2 of article 15 could be accompanied by a non-exhaustive enumeration of acts of aggression. However, it preferred the earlier version of paragraph 1 of that article, since the new one did not include individuals who themselves committed acts of aggression.

31. If it was decided to delete apartheid as a crime, broader provisions should be inserted into the draft Code to cover all forms of institutionalized racism.

32. He supported the Special Rapporteur's proposal to consider individuals acting in their own capacity as possible perpetrators of war crimes, and he firmly supported the inclusion of enforced disappearances in that category of crimes given that Croatian families had suffered from that phenomenon in recent years.

33. With regard to the article on war crimes, Croatia accepted the new title, "war crimes", and preferred a reference to "international humanitarian law" rather than to the Geneva Conventions of 1949.

34. Lastly, Croatia felt that the question of wilful and severe damage to the environment should be dealt with in an article separate from those concerning aggression, war crimes and international terrorism. In order to study the wilful damage done to the environment in Croatia, his Government had organized a conference in Zagreb in 1993 on the effects of war on the environment and had reported on that conference within the framework of the United Nations Decade of International Law.

35. Mr. KOCETKOV (Bosnia and Herzegovina) said that since its independence, his country had been exposed to brutal aggression unprecedented in Europe since the

end of the Second World War. Paramilitary and para-police forces of the Karadzic regime that had the support of the so-called Federal Republic of Yugoslavia (Serbia and Montenegro) and its terrorist gangs, such as the Seselj and Arkan forces, and other organizers and executors, would have to be punished for the crimes they had committed. On the other hand, it was important to note that Karadzic was not supported by all Bosnian Serbs and certainly not by patriotic and democratically oriented Bosnian Serbs.

36. With regard to the draft Code of Crimes against the Peace and Security of Mankind, his delegation felt that the definition of war crimes in draft article 22 should include certain acts that had been perpetrated against Bosnia and Herzegovina. The first such act should be the long-term siege of populated places, a situation which still existed in Sarajevo, Gorazde, Srebrenica, Zepa and Bihać, all of which had been declared safe areas by the Security Council. The sieges of the above-mentioned cities had led to the deaths of thousands of civilians, many of them women and children, interruptions in the supply of humanitarian and medical aid, the cutting off of utilities, blocking of roads, railways and telecommunications services, threats against the security of troops of the United Nations Protection Force (UNPROFOR) and restrictions on their freedom of movement. All those acts, which had been condemned under international law, should be considered a crime under draft article 22.

37. The second act which should be so classified was the mass and systematic rape of women and girls, which had constituted part of the practice of ethnic cleansing directed against the non-Serb population. That crime was not merely a case of imposing measures intended to prevent births within that group but constituted an outright war strategy.

38. Mr. PFIRTER (Observer for Switzerland) said that the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind had had two main thrusts: the definition of crimes and the establishment of a scale of penalties. In its analysis of the two problems, the Commission should bear in mind as guidelines the relationship between the draft Code and the Commission's draft articles on State responsibility on the one hand and progress in its work on the establishment of an international criminal tribunal on the other.

39. With respect to the first issue, it should be noted that the relationship between article 19 of the draft articles on State responsibility and the Code was less obvious than the relationship between that article and the peremptory norms of international law. Article 19 dealt with the responsibility of States, while the Code dealt with individual criminal responsibility. Therefore there was no reason why the lists of offences appearing in the two texts should be identical, even though there might and should be some degree of overlap between them. For example, it could be said that the definition of aggression would differ in the two cases: in the context of article 19, which dealt with the responsibility of States, it would cover acts of aggression as a whole, while in the Code, under the Nürnberg Principles individual responsibility might be limited to wars of aggression.

40. The second question - that of the relationship between the Code and the future statute of an international criminal court - was more complex. The first objective of the Code was to formulate a series of norms of international law that could be applied by States and particularly by States' courts. The second objective was to apply those rules internationally, and for that purpose the Code should be used by the international criminal tribunals and above all by the future international criminal court. It should be noted that the Code and the future court shared a common purpose: that of enabling national courts or an international body to punish particularly abhorrent crimes committed by States or individuals. Thus the two drafts should correspond as closely as possible, especially with respect to the definition of crimes and the nature and degree of punishments, and all the more so since, given the current status of work on the establishment of an international criminal court, national tribunals and the court should be complementary.

41. As to agreement on the definition of crimes, his delegation welcomed the fact that the Ad Hoc Committee on the Establishment of an International Criminal Court, had preferred to take into account only the most serious crimes punishable under general international law, namely aggression, genocide, grave breaches of humanitarian law, war crimes and crimes against humanity.

42. If the Commission decided to retain individual criminal responsibility for the crime of aggression, in order for that responsibility to have a solid legal basis, it might be necessary to limit it to the case of wars of aggression.

43. With respect to genocide, he noted that the International Court of Justice, as indicated in its 1951 advisory opinion on reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, had declared that the provisions of the Convention were a part of customary international law. In defining genocide, then, it would be appropriate to make that definition consistent with those provisions.

44. With regard to systematic or mass violations of human rights, he shared the view of the Special Rapporteur that it would be appropriate to list them under the heading "Crimes against humanity" and to ensure that the list included acts which had not been committed in the context of an armed conflict.

45. He agreed that war crimes, covered in draft article 22, should include references to the Geneva Conventions of 1949 and the laws or customs of war and pointed out that it would be necessary to refer to Additional Protocols I and II, or at least to common article 3 of the Geneva Conventions.

46. He appreciated the reservations that might arise if wilful and severe damage to the environment was included in the list of crimes contained in the draft Code; currently, however, acts of that type committed in situations of armed conflict or in times of peace could constitute a threat to the peace of mankind which might not be covered, or covered inadequately, under the other categories. Consequently, his Government reserved the right to raise that issue on a subsequent occasion.

47. One of the most difficult problems posed by both the draft Code and the draft statute of an international criminal court was that of penalties. The Code was to be applied both internationally and nationally and, clearly, the statute should specify the penalties applicable to the crimes defined in the draft Code. Yet, the latter might refer, for example, to the scale of penalties established by the internal law of the State in whose territory the act had been committed, which implied that that State would have enacted appropriate legislation on the matter.

48. With regard to the remaining categories of crimes and crimes which would not fall within the competence of the proposed international criminal court, it was essential that appropriate legislation should be enacted under the draft Code. Various solutions had been proposed for that purpose: one would be to set a maximum penalty and allow the national court to hand down the punishment at its discretion without exceeding that limit, which would be contrary to the principle of nulla poena sine lege. Another possibility would be to make States responsible for establishing effective penal provisions in their legislation, which would make it possible to solve the problem at both the national and the international levels. However, to avoid wide disparities, it would seem advisable for the Code itself to set maximum and minimum penalties.

ADDRESS BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

49. Mr. BEDJAOUI (President of the International Court of Justice) said that history showed that justice had made progress only when there had been a consolidation of the social order which it was required to pacify; what applied to national judicial systems applied equally to the international judicial system. However, States had always invoked the sacrosanct principle of national sovereignty to ward off any attempt to structure international society along the lines of national societies in which the judge heard and determined cases on the basis of a corpus juris enacted by a legislator and he could count upon the intervention of the police to enforce his decisions.

50. The system devised 50 years previously in San Francisco had not ushered in any real revolution in that regard as it was based upon a schema comprising an international executive function, deliberative function and judicial function devolving respectively upon the Security Council, the General Assembly and the International Court of Justice. As a general rule, neither the General Assembly nor the Security Council was invested with the capacity to create rules that were legally binding upon Member States. Article 94 of the Charter provided that the Security Council could decide upon measures to be taken to give effect to the judgments of the Court, but that mechanism was governed by criteria of expediency which only the Council was able to assess. The lack of any real international legislature and police force accordingly ruled out any conclusion that there was an international judicial power in the true sense of the term.

51. The Court, once relegated to the sidelines, was now in the forefront of the maintenance of international peace and security. Currently no less than 10 contentious cases were pending before it, and two requests for advisory opinions. Those were not minor matters, but crucial issues, including the

question of nuclear weapons, and other important issues such as the application of the Convention on the Prevention and Punishment of the Crime of Genocide.

52. The Court had been criticized on the grounds that its record of activities, in quantitative terms, appeared to be less impressive than that of the Permanent Court of International Justice. However, over a period of 50 years, the Court had handed down 60 judgments and 21 advisory opinions.

53. The optional clause of the Court's Statute had had less success than that of its predecessor, the Permanent Court of International Justice, but currently one third of the States parties to the Statute had accepted the compulsory jurisdiction of the Court. However, it should be noted that the greater or lesser degree of acceptance of the compulsory jurisdiction of the Court was not the only criterion for evaluating the extent to which States were prepared to have their disputes settled by it. The actual volume of cases before the Court was a great deal larger than it had been 30 years previously.

54. The significance of the number of declarations of acceptance of the Court's compulsory jurisdiction was also relative, first because of the reservations that frequently accompanied them, and secondly because of the preliminary objections made by States which had made such declarations.

55. An important factor should be mentioned which helped to explain the greater extent to which the Permanent Court of International Justice had been favoured by States. The peace treaties concluded at the end of the First World War had entrusted the Permanent Court with some specific responsibilities which had enhanced its activity. However, the settlement of the questions arising from the Second World War had been entrusted to organs specially created for that purpose.

56. Moving on to factors linked to the international context, it was necessary to bear in mind the greater enthusiasm for judicial settlement in the era of the Permanent Court. Nor should it be forgotten that the society of nations at that time had been culturally and politically more homogenous than the international society resulting from the Second World War, which had been caught up almost immediately in East-West dissension and then riven by the upheavals of decolonization and the difficult North-South dialogue.

57. The defiant attitude of the newly independent countries with regard to international law, in whose formulation they had not participated, had been accompanied by suspicion directed against the Court itself. Indeed, the judgment delivered in 1966 in the South West Africa case had shaken the confidence in the Court of a large section of the international community, which had seen in it an instrument in the service of a conservative brand of international law. That had also led to a hardening of the position of the third world countries regarding the legal settlement of disputes.

58. The experience of the Permanent Court and of the International Court had shown that there was more recourse to legal settlement during periods with little international tension, and that the opposite was true during periods of increased international tension. For example, the Court's role had been minimal

during the periods of great international tension during the cold war. It should also be noted that the international community had taken many years to heed the appeal made by the General Assembly in resolution 171 (II) of 14 November 1947, in which it had encouraged Member States and the United Nations system to make greater use of the Court's services. From 1970 onwards the Court had succeeded in regaining some of the confidence of the third world countries, which represented over half the members of the international community.

59. The greater willingness of States to have recourse to the Court was also mirrored by the new attitude of the States of the former communist bloc, most of which had withdrawn the reservations they had made to provisions relating to the Court's jurisdiction which formed part of numerous multilateral treaties. Some of those States had also accepted the compulsory jurisdiction of the Court.

60. It could be said that a new phase had started in the life of the Court. First, because there was every indication that the international community had vested the Court with a not inconsiderable part of the primary responsibility for the maintenance of international peace and security, a task formally conferred by the Charter upon the Security Council, and second because, on many occasions, the Court's decisions or the mere fact that recourse had been made to the Court had made a decisive contribution to maintaining or restoring peace among parties, as had occurred, for example, in the case of the frontier dispute between Chad and Libya. Lastly, the Court's contribution to the maintenance of international peace and security was demonstrated by the implementation of the Court's decisions by the parties concerned.

61. It could be said that the confidence placed in the Court and the considerable increase in its activity augured well for the future. In that respect, the fear was unfounded that the recent proliferation of mechanisms for the judicial settlement of disputes, such as the International Tribunal for the Law of the Sea, the Central American Court of Justice, the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe and the International Criminal Tribunal for the Former Yugoslavia, combined with the relative narrowness of the Court's jurisdiction rationae personae and rationae materiae, could marginalize the Court or undermine its future work. Instead, that proliferation of bodies could enable the Court to focus on disputes of major political importance.

62. Contrary to what was often asserted, all political conflicts included legal elements on which the Court could make pronouncements. States should therefore consider entrusting particular aspects of disputes to the Court in order to facilitate the resolution of overall disputes between them. It was to be hoped that States would heed that appeal on the Court's fiftieth anniversary.

63. The CHAIRMAN said that while the Committee was concerned with the formulation of norms of international law, the application of those norms was the task of the International Court of Justice. That was an important function which must be supported by all States, particularly in view of the clear trend of current activities in the legal sphere to concentrate on the application of existing norms. For example, that had occurred at the Fourth World Conference

on Women, and had been reflected in the plan of action. That trend reflected the feeling that there was no scarcity of norms, but a lack of the means to implement them.

64. The simultaneous presentation of the reports of the International Court of Justice and of the International Law Commission at the current session was a positive aspect. It was not always possible for both reports to be introduced simultaneously, but, in future, an effort would have to be made to ensure that, as far as possible, they were introduced together, preferably towards the end of October.

The meeting rose at 12.35 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
15th meeting
held on
Monday, 16 October 1995
at 3 p.m.
New York

SUMMARY RECORD OF THE 15th MEETING

Chairman:	Mr. LEHMANN	(Denmark)
later:	Mr. CAMACHO (Vice-Chairman)	(Ecuador)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. SIDI ABED (Algeria) said that chapter II on the draft Code of Crimes against the Peace and Security of Mankind was the most important section of the Commission's report (A/50/10). It was unfortunate that the draft Code had been dissociated from the draft statute of an international criminal court, given that the court had originally been envisaged as a legal body in which the draft Code would be applied. He regretted, too, that the Commission had been unable to complete its study of the draft Code as promptly and as efficiently as it had done in the case of the international criminal court.

2. His delegation favoured a general, conceptual definition of the crimes to be covered in the Code and believed that the list of crimes should be limited to those which were difficult to challenge as crimes against the peace and security of mankind. The definition must be sufficiently open to allow the Code to be applied in a variety of circumstances, yet it was important to maintain the legal tradition that crimes, and the penalties applied to them, should be enumerated in detail. The "provisional restriction" referred to in paragraph 41 of the report should make it possible to reach consensus on the six crimes identified by the Special Rapporteur.

3. The Commission should not engage in the pointless exercise of seeking a new definition of aggression. The definition contained in General Assembly resolution 3314 (XXIX) would meet the Commission's needs. He agreed with the reasons given in paragraphs 68 and 69 of the Commission's report for deleting article 15, paragraphs 4 (h) and 5: no legal principle entitled the Security Council to intervene in an international criminal proceeding, nor was any Security Council determination binding, under the Charter of the United Nations, on an international court, since Council decisions did not take precedence over international agreements. While such an inegalitarian system might exist, that fact did not justify its codification by the Commission.

4. With regard to the crime of genocide (art. 19), the Convention on the Prevention and Punishment of the Crime of Genocide offered a clear definition which was sufficient for the draft Code.

5. Terrorist acts were crimes of an exceptionally serious nature which threatened the peace and security of mankind. A legal definition, divorced from any political or conceptual considerations, would facilitate the inclusion of the crime of international terrorism in the draft Code. He concurred with the opinion expressed in paragraph 107 of the report and was pleased that the crime had been included in the draft Code; only political considerations could argue for its exclusion. The definition proposed by the Special Rapporteur was a reasonable and objective one, although its drafting could be improved further.

6. His delegation hesitated to have apartheid removed from the list of crimes; however, because of the historical connotations of the word, a more acceptable term should be found to define the crime. In addition, the colonization of an occupied territory and the alteration of its demographic composition were among the most reprehensible of war crimes and should be included in the draft Code.

7. Mr. MIKULKA (Czech Republic) said that the lack of consensus on certain crimes in the draft Code justified the approach taken by the Special Rapporteur. The Code's content ratione materiae would be a major factor in determining a State's attitude towards adoption of the draft text. It was therefore best to limit the scope of the Code to the most serious crimes which evoked strong international condemnation. What must be codified was not all crimes by individuals under international law, but only the "crimes of crimes", in the words of the Commission's report, although that expression should not be interpreted as implying a hierarchy of categories of crimes.

8. To reduce the number of crimes covered by the Code was not to deny the criminal nature of other acts committed by individuals and punishable under existing international instruments. Such crimes should be dealt with through existing international instruments, or, if necessary, by amendments to those instruments, a situation which would be reflected in the resolution by which the Code was eventually adopted. However, crimes listed in the Code should include, above all, those covered under established rules of international and customary law whose application did not depend on whether the Code was adopted in the form of a convention. The Commission should concentrate on crimes for which the guilty parties were directly responsible under general international law and which were defined as crimes independently of domestic law and without the need to determine whether the State was party to a given international convention.

9. The Commission had considered the criteria to be used in establishing the definitive list of crimes. Not all crimes against the peace and security of mankind were of a massive nature, and criteria such as extreme gravity or a serious and immediate threat to the peace and security of mankind were often evident only when such acts were viewed against the background of the conditions obtaining at the time of their commission. A definition of crimes against the peace and security of mankind that was both general and specific would therefore be very useful.

10. The Code should, above all, define international crimes committed by States so that the criminal responsibility of individuals who had participated in such crimes would be linked to the responsibility of the State. Draft article 5, on responsibility of States, was therefore of particular importance, although the drafting could still be improved. In that connection, he noted that article 10 of the Commission's draft articles on State responsibility stated that "in cases where the internationally wrongful act arose from the ... criminal conduct of officials or private parties ... punishment of those responsible" might constitute one form of satisfaction. It was therefore incorrect to state in the draft Code that "Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it", since such prosecution was an integral part of the satisfaction provided. He hoped that during its second reading of the draft Code, the Commission would consider that

problem in the context not only of article 5 but also of the definition of general criteria for crimes against the peace and security of mankind.

11. With regard to the characterization of an act or omission as a crime against the peace and security of mankind, he hoped that article 2 of the draft Code would be retained. The independence of such a characterization from national law was a corollary of the idea that such crimes were crimes of international law, as had been recognized since the time of the Nürnberg Tribunal. That fact was reflected in the wording of article 1 of the draft code, although he failed to understand why the words "under international law" had been placed in square brackets. The adoption of the first sentence of article 2 as currently worded did not imply an elimination of the role of national law. However, unlike the conventional or customary rules of international law, national law had, by necessity, a limited role, as the Commission had acknowledged in its preparation of the draft statute of an international criminal court. The provisions of national law could not be applied where they conflicted with international law. Thus the classification of an act or omission as a crime against the peace and security of mankind under general international law was independent of national law, and that precedence of international over national law should be explicitly confirmed in article 2.

12. All national law had a common basis in the areas of the protection of fundamental rights and of criminal procedure. Therefore, although international law provided a sufficient basis for the classification of crimes, related matters, such as questions of punishment, might require recourse to national law. However, that possibility was not excluded by the existing text of article 2.

13. As to whether the notion of criminal intent should be referred to in draft article 3, he felt that intent was implicit in the nature of the acts covered by the article and that it would be sufficient to deal with the matter in the commentary. Considering the limited nature of the list of crimes, he felt that the existing provisions concerning the prosecution of individuals guilty of complicity should be retained.

14. It was to be hoped that in its second reading of Part II of the draft Code the Commission would refine its definitions of crimes in order to approximate standards of criminal law as closely as possible. Since the statutes of existing or future international courts contained or would contain their own definition of crimes and penalties, he did not agree with those members of the Commission who felt that it would be possible to dispense with any such definition. On the contrary, as an instrument separate from the statutes of international courts, it was the Code that should define substantive law, which must apply to both national and international courts. The question of penalties could be discussed in a general provision rather than in the provisions dealing with specific crimes.

15. The inclusion of the crime of aggression was supported by the entire Commission, and the difficulties in defining that crime were well known. The solution did not lie in adopting the definition set out in General Assembly resolution 3314 (XXIX), which defined an act committed by a State and,

consequently, did not include the necessary elements for prosecuting individuals who had contributed to the preparation or commission of an act of aggression. The first paragraph of draft article 15 was a step in the right direction, but its wording could be further improved.

16. The provisions of article 15, paragraph 4 (h), regarding the determination by the Security Council of acts of aggression, and paragraph 5, which stipulated that any such determination by the Council was binding on national courts, had given rise to discussions regarding the Council's role. A distinction must be drawn between the role of the Security Council in the area of substantive law and its role with respect to procedure before an international criminal court. The purpose of the draft Code was to codify substantive law, particularly as it applied to the qualification of the criminal conduct of individuals. His delegation believed that the crime of aggression should be dealt with solely by an international court, and therefore favoured the elimination of paragraph 5.

17. Paragraph 2 of article 23 of the draft statute for an international criminal court stipulated that a complaint directly related to an act of aggression could not be brought under the statute unless the Security Council had first determined that a State had committed the act of aggression which was the subject of the complaint. His delegation believed the provision was purely procedural in nature and had no bearing on the definition of the crime of aggression.

18. Like most of the members of the Committee, his delegation supported the Special Rapporteur's proposal to eliminate the crime of the threat of aggression, which had not been defined in satisfactory fashion, and to suppress the article that dealt with colonial and other forms of alien domination on the grounds that colonial domination had been eliminated and the concept of alien domination was too imprecise. His delegation endorsed the new text of draft articles 19 and 21.

19. While his delegation approved of the new text of draft article 22, it hoped that the article as drafted would not be interpreted to mean that punishment of exceptionally serious war crimes was contingent on the States in question being parties to the Geneva Conventions of 1949. With regard to draft article 23, his delegation supported the Special Rapporteur's decision to eliminate the crime of recruitment of mercenaries and agreed that the acts originally dealt with in that article could be prosecuted as crimes of aggression.

20. His delegation shared the belief that, unlike the crimes of aggression, genocide, other crimes against humanity or war crimes, which could be prosecuted on the basis of international law, international terrorism and drug trafficking should be prosecuted on the basis of existing instrument. Accordingly, the international community should endeavour to urge States to become parties to the relevant conventions. While wilful and severe damage to the environment should not be included as a crime in the draft Code, certain elements of those crimes could be reflected in the article on war crimes.

21. Mr. HOLTER (Norway), speaking on behalf of the Nordic countries, said that those countries fundamentally favoured a code of crimes against the peace and security of mankind but believed that because important matters of principle and

technical questions remained unresolved, further clarification of the current draft Code was required. The crimes to be included in the draft Code should fulfil two criteria: they should actually constitute crimes against the peace and security of mankind, and they should be suitable for regulation by that type of instrument.

22. He welcomed the proposal by the Special Rapporteur to limit the number of crimes to be included in the Code to 6 of the 12 crimes adopted on first reading. The Nordic countries believed that in order for the Code to become a successful instrument of international law, it should focus on the most serious crimes against the peace and security of mankind and therefore be relatively limited in scope.

23. Ms. FERNÁNDEZ GURMENDI (Argentina) said that the draft Code of Crimes against the Peace and Security of Mankind was of particular relevance at a time when very serious crimes were being committed in various parts of the world and when great interest was being shown in the establishment of an international criminal court. Her Government endorsed the Commission's decision to restrict the draft Code to crimes of indisputable seriousness and to concentrate on four among them, namely aggression, genocide, crimes against humanity and war crimes.

24. Such a restricted approach had been considered by many to constitute "legal surgery", yet surgery was often the only way to save a patient. In the case at hand, the deletions resolutely effected by the Commission had been based on developments in international relations and were absolutely necessary to preserve the draft Code's viability and acceptability. The restrictive approach also corresponded to the view prevailing in the meetings of the Working Group on a draft statute for an international criminal court, where the majority of States seemed to favour limiting the competence rationae materiae of the court to a "hard core" of crimes under general international law which offended the conscience of mankind as a whole.

25. The draft Code and the proposed international criminal tribunal were two different projects which were not necessarily related, since progress on one was not dependent on progress on the other. Furthermore, her delegation shared the view of the United States of America that emphasizing the connection between the draft Code and the draft statute of the court might jeopardize progress towards the establishment of the court. Nevertheless, it was not possible to ignore the close ties between the two, especially since the prevailing view within the Working Group was that the statute of the court should include a list of crimes that came within its competence, thereby changing the statute from a strictly descriptive or procedural instrument to one which incorporated substantive norms of criminal law.

26. Thus, in a few months time, States and the International Law Commission would be working to define the same crimes. It was to be hoped that each forum would avail itself of the work of the other. The observations of the representative of Austria were particularly relevant in that regard, and her delegation agreed that it was important to strengthen cooperation between States and the Commission, maintaining an ongoing dialogue through flexible and informal channels.

27. Turning to the four crimes on which the Commission would be focusing its attention, she said that her Government had not yet reached a final decision with regard to the crime of aggression, but was not, in principle, disposed to set aside prematurely that which the Commission had characterized as the quintessential crime against the peace and security of mankind. Nevertheless, determining individual responsibility for the crime of aggression gave rise to serious obstacles which appeared increasingly insurmountable.

28. By virtue of its mandate under the Charter, the Security Council must make a prior determination of an act of aggression. At the same time, intervention by a political body could give rise to legal and institutional difficulties. For example, a successful challenge to such a determination might result in a judicial decision that was contrary to the Council's ruling, a situation which was inconceivable. Furthermore, if the accused party did not have the right to question the Security Council's decisions, objections might be raised with regard to due process. The range of defences available to the accused would in that case be severely limited or almost non-existent, particularly where the accused was a head of State or Government.

29. The crime of genocide raised the least number of technical issues. Her delegation endorsed the decision to proceed on the basis of the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide, which had gained wide acceptance.

30. With regard to crimes against humanity and war crimes, her Government shared the view that serious atrocities committed within national borders should be considered as international crimes. Events in the former Yugoslavia and in Rwanda demonstrated the need for serious consideration of the criminal aspects of international humanitarian law applicable in non-international armed conflicts, bearing in mind that such conflicts seemed to occur with much greater frequency than international armed conflicts.

31. War crimes should, therefore, include crimes committed in non-international armed conflicts. Until recently, it had been generally accepted that neither article III, common to all the Geneva Conventions, nor the second Protocol, additional to those Conventions, which did not contain provisions on serious crimes, could provide a foundation for universal jurisdiction. Article 4 of the Statute of the International Tribunal for Rwanda expressly included both provisions, setting aside that argument, which was not totally convincing from a legal point of view, and remedying, at least in that case, one of the main weaknesses of international law. The draft Code of Crimes should take its inspiration from that precedent.

32. Her delegation endorsed the proposed change in the title of article 21 of the draft Code from "Systematic or mass violations of human rights" to "crimes against humanity". She wondered whether the list should also include certain acts committed in times of peace. Serious crimes against civilian populations which were carried out in a regular and systematic manner in times of peace might endanger peace and, consequently, international peace and security, and should therefore be included in the list of crimes against humanity.

33. Mr. POSTICA (Romania) said that recent tragic events in the former Yugoslavia and in Rwanda had demonstrated, more than ever, the need for a code of crimes against the peace and security of mankind and for the international community to put an end to the tragic phenomenon of impunity. By doing so, it would discourage flagrant violations of human rights wherever and whenever they occurred. In order to achieve that objective, it was necessary not only to establish an international criminal court but also to adopt a code of crimes that would effectively prevent and punish crimes against humanity and world civilization.

34. The crime of aggression, which had been the subject of extensive debate, continued to raise serious difficulties for two main reasons. Firstly, it had not been defined in any other conventional instrument; and secondly, aggression seemed to affect States or Governments, rather than individuals. His delegation believed that a broad definition of the term and a non-exhaustive list of acts of aggression would provide a better basis for future discussions on that topic.

35. With regard to other articles in the draft Code, his delegation endorsed the new text of draft article 19 proposed by the Special Rapporteur and supported the proposal to refer to the crimes mentioned in article 21 as "crimes against humanity". His delegation was of the view that article 22, which dealt with war crimes should include only the most serious of such crimes.

36. Lastly, while he understood the reasons that had led the Commission to express interest in the crimes of racial discrimination, colonial domination, international terrorism and illicit trafficking in narcotic drugs, it would be unrealistic for the Commission to extend the scope of its work to include such crimes at present.

37. Mr. DEL MAR (Philippines) said that in a world where confrontation between the super-Powers no longer took centre stage, the work of the International Law Commission was assuming particular importance. Its report on the work of its most recent session demonstrated the potential role international law could play in providing guidance on specific issues.

38. The Commission had dedicated long years to establishing regimes for international responsibility and international liability, highlighting the prevailing view that States were primarily responsible for their own acts and for the acts of individuals. However, recent events in Bosnia, Rwanda and elsewhere had made it clear that there was a need to consider the responsibility of individuals for acts which had, in the past, generally been attributed to States. Individuals could also violate the sovereignty of a State, harm its interests or injure its subjects.

39. Most countries did not have adequate national legislation to deal with such occurrences. In many cases, particularly in countries which followed the restrictive rule of territorial jurisdiction, an individual could plot to or actually destabilize another country without fear of criminal prosecution. In his own country, no criminal action could be instituted against an individual who committed an act of aggression against another country or intervened in its sovereign affairs, acts clearly prohibited under international law. Furthermore, in many States, as in his own, it would be very difficult to invoke

international law in the absence of internal law because the rights of the accused to procedural and substantive due process would have to prevail. In the case of terrorism or drug trafficking, unless part of the act had been committed within its territorial jurisdiction, the Philippine Government would find it difficult to provide grounds for prosecution.

40. The territorial restrictions of the Philippine penal code gave rise to extreme situations. For example, a Filipino who committed mass murder, even of other Filipinos, outside Philippine territory could never be brought to trial in his own country. Internal law in the Philippines did not reflect modern realities, in particular the fact that Filipino workers were victimized en masse through illegal recruitment or abusive employment practices outside the territorial jurisdiction of the country. While it could punish crimes such as piracy and white slavery, his Government was unable to punish other crimes against the peace and security of mankind.

41. States should do more to strengthen the efforts of the International Law Commission to attribute individual responsibility for crimes against humanity. Much progress had been made in that direction in terms of administrative arrangements, extradition procedures and mutual legal assistance among States. Yet much remained to be done. States must re-examine their domestic law in order to remedy any lacunae in that area. The Philippines was currently considering major reforms to its penal code, which would bring it up to date with contemporary realities and ensure that the Government could fulfil its obligations to respect the sovereignty, political independence and territorial integrity of other countries.

42. Establishing an international regime of individual responsibility for crimes against States should not overshadow the fact that States bore primary responsibility for preventing such acts. The Commission had made itself clear on that point: a State could not be absolved of responsibility for an act by virtue of the fact that it was attributable to individuals who might or might not be agents or subjects of that State.

43. His delegation endorsed the Commission's position with regard to the establishment of an international criminal tribunal. Such a tribunal should not, however, serve to discourage States from exercising their own jurisdiction over the crimes in question or from taking primary responsibility from rendering justice in those cases.

44. Mrs. DASCALOPOULOY-LIVADA (Greece) said that at its forty-seventh session, the International Law Commission had failed to make spectacular progress on the draft Code of Crimes against the Peace and Security of Mankind. Indeed, the completion of its work on that topic had had to be postponed until 1996.

45. Her delegation could not fully support the decision of the Special Rapporteur to reduce the number of crimes under the draft Code. While a proponent of neither the minimalist or maximalist school, it considered that the gravity or significance of a particular crime should be the sole criterion for inclusion in the Code.

46. There could be no doubt that aggression constituted the quintessential crime in international relations and, consequently, the "hard core" of the draft Code. As currently worded, paragraph 2 of article 15 reflected the relevant Article of the Charter of the United Nations and therefore provided an adequate basic definition of aggression. The list of acts of aggression contained in paragraph 4 of article 15, which had been deleted, would have helped to clarify the principle set forth in paragraph 2 and to eliminate, in so far as possible, the risk that cases of minor importance might fall within the scope of the general definition.

47. At the same time, paragraph 4 had not been entirely satisfactory. In particular, there was need for further scrutiny of the role of the Security Council in determining the existence of an act of aggression. While the Council's determination in that regard must be binding on national courts, the reverse should not be true: a national court should not be prevented, in the absence of a determination from the Security Council, from deciding that an act of aggression had or had not been committed. That would not serve justice and could, in certain cases, be considered as letting political considerations determine the course of justice.

48. She wished to recall her delegation's proposal with regard to the consequences of aggression, namely, unlawful occupation, annexation and succession, which read: "Deliberate failure to respect the mandatory decisions of the Security Council, designed to put an end to an act of aggression and to wipe out its unlawful consequences, is a crime against peace".

49. There was no doubt that the crime of genocide belonged in the draft Code. Her delegation endorsed the Special Rapporteur's proposed definition, which included the concepts of incitement and attempt, thus bringing it closer to that provided under the Convention on genocide and that used in the statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Tribunal for Rwanda.

50. The crimes listed under article 21, as adopted on first reading, had mistakenly attributed to individuals the capacity to violate human rights. It was widely accepted within the Sixth Committee that States had an obligation to respect and protect human rights and, by implication, that only States could violate such rights. Individuals could only commit crimes in violation of criminal law. Where such crimes were committed in a systematic or massive way and were of such gravity as to affect the entire international community, it was appropriate to speak of crimes against humanity. Her delegation therefore supported the proposed change of the title of article 21 to "Crimes against humanity". Under that new title, the article could justifiably encompass the conduct of individuals acting in their personal capacity and not as agents or representatives of a State.

51. Her delegation also endorsed the Special Rapporteur's decision to change the title of article 22 from "Exceptionally serious war crimes" to "War crimes". The new version of the article was better organized in conceptual terms and was more consistent with the statutes of the two ad hoc international tribunals and the draft statute of the proposed international criminal court. Nevertheless, the article ought to include the crime of establishment of settlers in an

occupied territory and changes to the demographic composition of an occupied territory, which had been in the earlier version of the article.

52. Her delegation was not in favour of including international terrorism as a crime under the draft Code. That subject was covered by a number of conventions dealing with particular crimes on the basis of the principle of aut dedere aut judicare. However, the draft Code should include the crime of illicit trafficking in narcotic drugs. Nevertheless, it should be pointed out that crimes of that nature did not, as a rule, threaten international peace and security.

53. It was regrettable that article 16, on the "threat of aggression", had been eliminated from the draft Code. That phrase was explicitly mentioned in paragraph 4 of Article 2 of the Charter. Furthermore, like the prohibition of aggression, prohibition of the threat of aggression was a rule of international law having the character of jus cogens. It was therefore imperative that the concept of the threat of aggression should remain in the draft Code. It presented no more difficulties than the concepts of attempt, incitement and complicity. Article 16, as adopted on first reading, was a commendable effort.

54. While most of the crimes which the Special Rapporteur had proposed for deletion reflected practices which no longer existed, that did not justify their absence from the draft Code. Nothing precluded such acts from being repeated, and their inclusion in the Code would have a deterrent value. Wilful and severe damage to the environment, in particular, was bound to acquire increasing importance in the future; depending on their scope, such acts could constitute a real threat to the peace and security of mankind.

55. Mr. BOS (Netherlands) said that there was a parallel trend in both the Working Group on a draft statute for an international criminal court and the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind to reduce the list of crimes included in the Code to 6 of the originally adopted 12. The Netherlands Government had continually held the position that the Code of Crimes should be limited to the most serious crimes imaginable and that the international criminal court should have jurisdiction only with respect to those very serious crimes. Accordingly, a very close relationship should be established between the identification of crimes, the creation of the international criminal court and the acceptance of the court's jurisdiction for the crimes identified.

56. In discussions in the Sixth Committee regarding the first draft of the Code, his delegation had proposed three criteria for the selection of crimes and for the jurisdiction of the international criminal court. According to those criteria, the only crimes that should be included where those which violated the "conscience of mankind", those whose character made it clear that no national procedures could be applied, and those which involved the personal criminal liability of the individual. On that basis, his delegation believed that only four crimes could be included in the Code of Crimes, namely, aggression, genocide, crimes against humanity and serious war crimes; the crimes of international terrorism and drug trafficking should not be put on the same level as large-scale violations of humanitarian norms such as those that had occurred in the former Yugoslavia or Rwanda.

57. In the case of the crime of terrorism, a number of international treaties had been established which provided for alternative forms of combating terrorist acts at the national or international levels. Accordingly, there was no need to include that crime among those falling under the jurisdiction of the international criminal court. Similarly, in the case of the crime of drug trafficking, international instruments had provided for a system of the exercise of national jurisdiction bolstered by inter-state cooperation.

58. One of the leading principles in the discussions of the Working Group on a draft statute for an international criminal court had been the principle of complementarity, which implied, inter alia, that priority should normally be given to national jurisdictions, or if necessary, international cooperation between such jurisdictions, in responding effectively to crimes. That principle implied also that the international criminal court should be competent only with respect to those crimes that might not be effectively addressed by national jurisdictions. Only when that principle was sufficiently respected would the results of the work of the Working Group be acceptable to Governments.

59. Finally, he welcomed the suggestion that a special mechanism should be established to ensure the harmonization of the provisions of the draft Code and the draft statute with a view to achieving a more coherent and integrated structure. In order to avoid holding discussions on that very important topic in two different forums, every effort should be made to coordinate the discussions held in each forum.

60. Mr. Camacho (Ecuador), Vice-Chairman, took the Chair.

61. Mr. VARSO (Slovakia) said that Slovakia's past experiences had led it to attach great importance to questions relating to the peace and security of mankind; in its foreign policy it supported all activities to promote friendly and constructive cooperation among States.

62. The report of the International Law Commission showed that much work remained to be done on the draft Code of Crimes against the Peace and Security of Mankind. On the content ratione materiae of the draft Code, his delegation felt that the main issue was to determine the purpose of the Code; otherwise, there were liable to be sterile discussions on whether a given crime should be included in the Code. Questions of the peace and security of mankind should be accorded the greatest attention by the international community on the basis of the most relevant legal considerations and, above all, should not be subject to mathematical or political calculations.

63. Since international peace was repeatedly being violated at the local and regional levels, endangering the international legal order, his delegation shared the view that an in-depth analysis should be made of the phenomena which threatened international peace and security. It felt that the Code should be seen as a preventive and punitive international instrument for the protection of the international legal order. That meant that only certain crimes should be included, particularly since each State could deal with crimes within its own sphere of competence.

64. It would be useful to reflect the two main objectives of the Code - the maintenance of peace within the international community and the protection of human lives - in the general provisions of the Code and to draw a clear distinction between what was being protected and acts or activities which violated the social order, the latter being considered as crimes against the peace and security of mankind. Crimes against peace should be analysed separately from crimes against security and, on that basis, separated into two categories. That distinction would help clarify terms often used in the report - seriousness, massive nature and violation of the international legal order - which could hardly be used to define crimes against peace, since a crime against peace was a crime wherever it took place, and on whatever scale, whereas in the case of crimes against humanity, it was relevant to determine the seriousness or scale of the acts or activities to determine whether they endangered the security of mankind.

65. The distinction also applied in respect of individuals who committed such crimes: while a crime against humanity could be committed by an individual who had no connection with the authorities of a State, a crime against peace could not be perpetrated, without support from a State. A distinction should be made between crimes committed by State representatives (both crimes against peace and crimes against the security of mankind) and crimes committed by other individuals (crimes against the security of mankind). Crimes committed by State representatives were all the more serious in that they involved the abuse of power; that aspect should also be taken into consideration with regard to penalties.

66. It was difficult to determine which acts or activities should be included in the specific articles of the Code so long as ambiguity remained about the object or objects protected by the Code. However, crimes against the status quo within the international community protected by the norms of jus cogens should clearly be included. It was obvious that aggression should be included among acts against peace, and his delegation was in favour of the Special Rapporteur's new wording. Similarly, genocide, war crimes and crimes against humanity when they were of a grave and massive nature should be included among acts or activities against the security of mankind. Illicit traffic in narcotic drugs, which was a modern form of genocide, also belonged in the category of crimes against the security of mankind.

67. His delegation agreed that the crimes in the Code should be formulated on the basis of the principle nullum crimen, nullum poena sine lege since, as a legal instrument, the Code must be clear and understandable for the persons protected and effective in respect of the potential culprits. His delegation also agreed that judges should play a central role in considering evidence and testimony regarding crimes committed, and that the judiciary must be independent from all political considerations which might influence its decisions.

68. Mr. LA GRANGE (South Africa) said that his delegation had taken due note of the assumptions underlying the draft Code. The Code should be sufficiently precise to meet the requirements of the principle nullum crimen sine lege: only the most serious international legal crimes should be included; the Code should be effective in enhancing international peace and security; and it should strengthen international law. However, it was his delegation's unwavering

opinion that the crime of apartheid could not justifiably be accorded secondary status. The Committee hardly needed to be reminded of the Security Council resolutions which had declared that apartheid constituted a threat to international peace and security, and of the General Assembly resolutions in which the policies and practices of apartheid had been condemned as a crime against humanity. The International Convention on the Suppression and Punishment of the Crime of Apartheid was in itself justification for maintaining article 20 of the draft Code. As of 15 July 1994, 36 States had signed the Convention and 96 had ratified or acceded to it.

69. The seriousness of the consequences of apartheid, which were still being felt daily by a majority of the people of South Africa, offered a legal basis for the inclusion of article 20. Apartheid's reach stretched well beyond the borders of South Africa, and had had a devastating impact on the countries and peoples of southern Africa. The contention that, since the scope of apartheid had been territorially limited, the phenomenon was therefore not worthy of inclusion in the Code rested on a flawed argument. His delegation felt that certain actions and policies were of legal relevance for the purposes of the Code because their intrinsic nature threatened the peace and security of mankind and because of the extreme seriousness of their consequences, regardless of when the actions had taken place on their territorial extent. It would thus be a disservice to future generations to exclude the crime of apartheid from the list of crimes.

70. Mr. SURIE (India) said that his delegation was not satisfied with the general outcome of the debate on the draft Code of Crimes against the Peace and Security of Mankind as it had progressed thus far, and he regretted that the latest text proposed by the Special Rapporteur had not included several crimes which had been considered important enough to merit inclusion in the first reading and before. Some of those crimes, such as terrorism, had assumed even greater importance and ought to have been included.

71. The Indian Government had repeatedly emphasized the close link between the draft Code and the statute for an international criminal court. Any weakening of the draft Code would correspondingly weaken the importance of a permanent court.

72. Regarding specific crimes, his delegation believed that the definition of aggression in the draft Code should be a legal one, even if it was based on the definition of aggression contained in General Assembly resolution 3314 (XXIX). Many of the proposals put forward in the Commission could provide the necessary material for such an exercise. In addition, there should be no distinction between an act of aggression and a war of aggression, provided that such an act had given rise to consequences so grave that they had threatened the peace and security of mankind. Merely emphasizing wars of aggression would be inadequate, given contemporary realities. Definitions of genocide and other relevant crimes would also have to be reviewed carefully before being included in the draft Code.

73. With regard to crimes against humanity, his delegation felt that the criterion of systematic and mass violations of human rights was necessary for such violations to be incorporated as a crime in the Code. In the case of such

crimes a basic question to be considered by the Commission was the threshold or point at which a violation which would otherwise fall within domestic jurisdiction became a matter of international concern. That issue was complicated by the absence of any universal agreement at the international level, and also by the lack of consensus on applicable standards, inadequate appreciation of the context of such violations, and the absence of credible and impartial means of establishing facts. Moreover, no conduct should be included as a crime in the Code unless it had threatened or was likely to threaten the peace and security of mankind.

74. Much more work needed to be done on the definition of war crimes, taking into account the comments and views of States and the laws and customs of armed conflict. The scope of the Code should be narrow and clearly defined, and should not deal with situations arising out of internal conflict, as the Code was meant to deal with crimes affecting international peace and security.

75. His delegation attached great importance to combating the fast-growing threat of terrorism and believed that that crime should be included as a separate category within the Code. The scope of the crime of terrorism should be enlarged by bringing within its ambit terrorist acts by individuals, as well as acts sponsored by others. A definition of terrorism could be attempted along the lines of the international conventions on the subject. In view of the increasingly insidious relationship between terrorism and illicit trafficking in narcotic drugs, his delegation supported the inclusion on illicit traffic in narcotic drugs as a crime under the Code.

76. His delegation felt that prosecution and punishment of the crimes to be included in the Code were best left to national systems. However, where a crime posed a threat to international peace and the order of a State or States, it should be tried under the Code by an international criminal court.

77. In sum, he noted that the international criminal court and the Code must jointly provide a basis for a non-discriminatory, objective and universal international criminal justice system. The absence of any specific crime from the draft Code in second reading could not alter its status as a crime under international law. The draft Code required further intensive review in order to establish greater clarity of the elements of the crimes involved; complement them with rules and procedures for evidence; provide prescriptions and criteria for investigation and surrender; and establish a proper balance between any such international criminal justice system and national criminal justice systems on the one hand and the United Nations Charter system on the other.

78. Mr. MÜLLER (Germany) strongly endorsed the view that the list of crimes to be included in the draft Code should contain only those offences whose characterization as crimes against the peace and security of mankind was generally accepted. Bearing in mind that the aim of the draft Code was to make possible the prosecution and punishment of individuals who had perpetrated crimes of such gravity that they victimized mankind as a whole, it seemed a sound approach to reduce the list to a "hard core" of crimes. Such a reduction would make it easier for the draft Code to become operative in the future, possibly in conjunction with the establishment of a permanent international criminal court. The German Government did not take the view that the crimes

removed from the list by the Special Rapporteur did not constitute serious wrongdoings, but it felt that a restrictive and concise list would have a greater chance of general acceptance by the international community.

79. If the draft Code was to become operational and form the cornerstone of an international system for the enforcement of criminal law, it would have to spell out clearly the general rules establishing individual criminal responsibility. His delegation welcomed the fact that the Commission had addressed the issue of personal responsibility in its consideration of article 3.

80. Nevertheless, the article dealing with responsibility and punishment should have been more specific. Given the wording with regard to complicity and attempt in article 3, paragraphs 2 and 3, personal liability to prosecution would appear to be almost limitless. The current wording seemed to reflect an unduly comprehensive notion of complicity and attempt. An overly broad notion of participation in a crime would make the draft Code difficult to implement and therefore reduce its prospects for acceptance by the international community.

81. While appreciating that it was extremely difficult to define crimes under international law in a manner precise enough to meet the rigorous standards of criminal law, his delegation nevertheless felt that the provisions envisaged in article 3, paragraphs 2 and 3, lacked the precision and rigour required under the principle of nullum crimen sine lege. They did not seem to offer a firm basis for unambiguously establishing individual responsibility.

82. Recalling also the principle of nulla poena sine lege, he reminded the Committee that individual responsibility did not merely require an abstract definition of a crime before an individual could be punished for it. The individual should also know what kind of penalty was applicable to his action. Welcoming the fact that the Commission had discussed the inclusion of penalties in the draft Code, he said that the draft Code should contain a general provision on the nature of possible penalties. Article 24 of the Statute of the International Tribunal for the Former Yugoslavia might serve as an example for such a provision.

83. With regard to article 15, on aggression, he expressed appreciation for efforts that had been made to give that concept a structure and definition that would be workable in the context of criminal law. Aggression must form an integral part of the draft Code. However, the task of defining aggression in terms precise enough to establish individual responsibility and ensure safeguards against arbitrary application seemed particulary elusive. The last part of the definition contained in the new text of article 15, paragraph 2, reflected the established language that had often been used by the United Nations, but was too vague and ambiguous for the purposes of criminal law.

84. Additional efforts were needed to define those elements of fact and personal behaviour that, taken together, constituted the most serious crimes against the peace and security of mankind. It seemed clear that any qualification of individual behaviour as a crime of aggression had to be preceded by a determination that a State had committed an act of aggression. Such a determination would necessarily have far-reaching implications for

international peace and security, and he wondered whether it could be made without engaging the responsibility of the Security Council.

85. Regarding draft article 26, on wilful and severe damage to the environment, the Commission would have to develop practical criteria for establishing conclusively whether, in a given case, the extremely serious charge of a crime against the peace and security of mankind was justified.

86. Ms. FLORES (Uruguay) said that despite the difficulties in achieving consensus on crimes to be included in the draft Code, there was no doubt that that instrument would help in strengthening the rule of law and combating the most serious crimes against international peace and security. Further work on the Code should seek to ensure due process and safeguard the principles relating to the human rights on which contemporary criminal law was based.

87. Two important elements must be borne in mind; first, that the formulation of the draft Code was not an isolated exercise and, second, that there was a need for precise definitions of each crime. The question of the relationship between the Code and the international criminal court had been raised repeatedly. The General Assembly, in its resolution 46/54, had invited the Commission, within the framework of the draft Code, to consider further the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court. The provisions of the Code must therefore be coordinated and harmonized with the provisions of the draft statute of the court, bearing in mind that the Code would constitute the applicable substantive law for the court.

88. The link between article 19 of Part One of the draft articles on State responsibility should also be taken into account, since the actions of individuals contributed significantly to the perpetration of crimes by States.

89. Article 1 of the draft Code should be reviewed and should include a general definition of the crimes included in the Code, and as well as a clear statement of the characteristics of such crimes, with a view to providing objective criteria.

90. Her delegation understood the considerations which had led the Special Rapporteur to reduce the number of crimes to be included in the draft Code from 12 to 6, particularly since some of the crimes deleted, such as threat of aggression and the recruitment, use, financing and training of mercenaries, could be included under the crimes of aggression or international terrorism. However, it was premature to drop other crimes, such as intervention or wilful and severe damage to the environment, from the Code. The crime of wilful and severe damage to the environment was of particular importance not only for current but also for future generations, and although some cases might be punishable under other provisions of the Code, the specific nature of the crime called for separate treatment. Moreover, as noted in paragraph 55 of the report, a restrictive list of crimes was no guarantee of acceptance by States, nor of consensus on its contents.

91. Although the Special Rapporteur had deleted six paragraphs of the text relating to the crime of aggression, which were based on General Assembly

resolution 3314 (XXIX), her delegation felt that some elements of that resolution should be included in the final text. Those elements had been reflected in other instruments, such as the Protocol of Amendments to the Inter-American Treaty on Reciprocal Assistance.

92. Her delegation supported the Special Rapporteur's solution with regard to the title of article 21 and also his suggestion that enforced disappearances should be included in that article.

93. Her delegation felt that a clear definition of each crime and the establishment of penalties with maximum and minimum limits for all the crimes listed in the Code were essential in accordance with the principle of nullum crimen, nulla poena sine lege.

94. Mr. SZÉNÁSI (Hungary) said that his delegation agreed with the Special Rapporteur that the scope of the draft Code of Crimes against the Peace and Security of Mankind should be reduced to six crimes, namely aggression, genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs and wilful and severe damage to the environment. The first four, which were due to be considered on a priority basis at the next session of the Commission, needed further discussion, improvement and refinement. In that connection, Hungary endorsed the Special Rapporteur's intention to return to the wording "crimes against humanity" and "war crimes" to describe the third and fourth items on the list, respectively.

95. Regarding draft article 26, on wilful and severe damage to the environment, that offence could be punishable under other articles, such as those on aggression or war crimes, or under other international legal instruments. In view of the particular importance Hungary attached to environmental issues, however, his delegation welcomed the Commission's decision to establish a working group to consider including the crime of environmental damage in the draft Code.

96. Hungary had a special interest in the matter of State succession and its impact on the nationality of natural and legal persons, owing to its geopolitical situation. The Hungarian Government welcomed the fact that the relevant principles and rules would relate both to the codification and the progressive development of international law, and shared the Special Rapporteur's view that a study of the effects of State succession on the nationality of natural persons was more urgent and should take priority over the separate problem of the nationality of legal persons. Hungary also endorsed the principle of the obligation of the predecessor State not to withdraw the nationality of the person concerned, the obligation of the successor State to grant its nationality to a well-defined category of persons, and the obligation of both States to grant a right of option.

97. He welcomed the progress that had been made in the area of State responsibility. With regard to countermeasures, the wording of draft article 13 was acceptable. In article 14, while his delegation agreed that most of the prohibited countermeasures contained in subparagraphs (a) to (d) were also covered by subparagraph (e), it would nevertheless be preferable to spell out those important rules. On the matter of dispute settlement, his delegation

endorsed the Special Rapporteur's proposal to establish a new dispute settlement obligation for States parties in relation to disputes that had arisen after the taking of countermeasures, although it believed that many States would be reluctant to accept such a compulsory system. That was particularly true of article 7, which provided for unilateral action by any party to bring the case to the International Court of Justice for a ruling on the validity of an arbitral award.

98. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, Hungary continued to believe that the issue was crucial in identifying and reaffirming the emerging provisions of international environmental law. It was sometimes difficult to make a clear distinction between "soft" and "hard" law in the field, but what was currently considered "soft" would most likely become "hard" in the future. Therefore his delegation supported the Commission's view that there existed a general obligation to prevent or minimize the risk of causing significant transboundary harm. Hungary had always been ready to conduct negotiations and cooperate in good faith with any of its neighbours on issues relating transboundary harm, and had always been willing to seek the assistance or mediation of any international organization in the field.

99. With regard to the law and practice relating to reservations to treaties, he hoped that, with the completion of political decolonization and the end of the cold war, the question of reservations could be addressed in a calmer atmosphere.

The meeting rose at 6.20 p.m.